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Recontextualising the *Rhetorica ad Herennium*

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PhD

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Abstract

This thesis will provide a sustained analysis of the relationship between the *Rhetorica ad Herennium* and its context in early first century BCE Rome. Over 250 examples in the *Rhetorica ad Herennium* illustrate the text's rhetorical theory, but in so doing they also provide a significant insight into the history, law, and politics of this period.

As I demonstrate, these examples show the preoccupations and perspectives of orators who were not necessarily from the political elite. They illustrate what could and could not be discussed in speech, and the modes of oratory that were encouraged by the author – *popularis* or not. The author's focus on forensic oratory also has important implications for understanding the use of the law and legal knowledge.

An important strand of this thesis is to compare the examples in the *Rhetorica ad Herennium* to those of Cicero's contemporary *De Inventione*. Although the two texts have often been treated as a pair, there are differences between the two. The contrasts are noteworthy in themselves, but they also emphasise the independence of the author of the *Rhetorica ad Herennium* and the potential to adapt theories and approaches as necessary. This is also an educational text, and the way it is constructed relates closely to its audience. I argue that the post-Social War context of the *Rhetorica ad Herennium* is key to understanding this audience, who may include newly enfranchised Italians using the Roman legal system for the first time.

By recontextualising the *Rhetorica ad Herennium*, it becomes clear that it is a very different text to the *De Inventione* in many ways. By highlighting these differences, I show that the work can stand alone as an object of enquiry and serve as a rich source for Roman Republican historians.

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Finally, to friends and family, and to Galen, thank you for the wonderful evenings, weekends, and holidays that have made these three years more than a thesis.

Needless to say, any mistakes that remain here are my own.

Author's Declaration

I declare that this thesis is the result of my own work and that I have referenced sources in cases where ideas are not my own: any omission of an accurate reference is an oversight on my part and will be corrected. This dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature _____

Printed name _____

Abbreviations

References to ancient authors and texts follow the conventions of the *Oxford Classical Dictionary*.

<i>CAH IX</i> ²	J. W. Crook, A. L. Lintott, E. Rawson (eds.) (1994) <i>The Cambridge Ancient History</i> , vol. IX. Cambridge.
<i>CCSL</i>	<i>Corpus Christianorum, series Latina</i> (1953–).
<i>CIL</i>	<i>Corpus Inscriptionum Latinarum</i> .
<i>FRHist</i>	T. J. Cornell (ed.) (2013) <i>The Fragments of the Roman Historians</i> , 3 vols. Oxford.
<i>Gramm. Lat.</i> [Hertzius]	M. Hertzius (ed.) (1961) <i>Grammatici Latini</i> , vols. 2-3. Hildesheim.
Lewis and Short	C. T. Lewis and C. Short (1879) <i>A Latin Dictionary</i> . Oxford.
<i>MRR</i>	T. R. S. Broughton (1951-2) <i>The Magistrates of the Roman Republic</i> , vols. 1-2. New York.
<i>MRR Suppl.</i>	T. R. S. Broughton (1986) <i>The Magistrates of the Roman Republic, vol. III: Supplement</i> . Atlanta.
Müller	K. O. Müller (1880) ² <i>Sexti Pompei Festi De verborum significatione quae supersunt cum Pauli Epitome</i> . Leipzig.
<i>OCD</i> ³	S. Hornblower and A. Spawforth (eds.) (1996) <i>The Oxford Classical Dictionary</i> . Oxford.
<i>OLD</i> ²	P. G. W. Glare (ed.) (2012) <i>Oxford Latin Dictionary</i> . Oxford.
<i>ORF</i> ⁴	H. Malcovati (1976) <i>Oratorum Romanorum Fragmenta Liberae Rei Publicae</i> . Turin.
<i>RE</i>	A. Pauly, G. Wissowa and W. Kroll (eds.) (1893–) <i>Real-Encyclopädie der klassischen Altertumswissenschaft</i> . Stuttgart.
<i>Rhet. Lat. Min.</i>	K. Halm (1863) <i>Rhetores Latini Minores</i> . Leipzig.
<i>RhG</i>	H. Rabe (ed.) (1931) <i>Rhetores Graeci, vol. XIV: Prolegomenon Sylloge</i> . Leipzig.
<i>RRC</i>	M. H. Crawford (1974) <i>Roman Republican Coinage</i> , 2 vols. Cambridge.
<i>TLRR</i>	M. C. Alexander (1990) <i>Trials in the Late Roman Republic, 149 B.C. to 50 B.C.</i> Toronto.

Introduction

The *Rhetorica ad Herennium* is a rhetorical handbook that contains over 250 vivid and informative examples about gruesome deaths, the passing of laws, personal insults, and much more. These examples provide an alternative look at the history of the early first century BCE, recording events and voices from a perspective that has not often survived elsewhere. But the potential of the text as a significant source for this period has not been fully appreciated, as other questions have drawn discussions about the text away from its content.

For over a century, three issues about the context and circumstances of the work have dominated the debate around the *Rhetorica ad Herennium*.¹ The first is that the text is anonymous. As the author is unknown, it is not immediately possible to discover their perspective and approach to the text. A second problem is that the dating of the work is not secure, which makes it more difficult to locate the text in its political, social and cultural context. A third problem has also hindered a full analysis of the text: there are significant parallels, from general structure to detailed word order, between the *Rhetorica ad Herennium* and Cicero's early rhetorical work, *De Inventione*. In trying to understand how and why these similarities exist, the two texts have become almost synonymous and are often treated together, which elides their important differences.

There are not simple answers to these questions, but scholars have made reasonable hypotheses. As I will discuss in this Introduction, the identity of the author may never be certain, but there are many suggestions within the work itself about the type of person he was. The date of the work cannot be narrowed down to a year or month, but the traditional dating of 86-82 BCE fits well with the evidence at hand. And by looking carefully at the *Rhetorica ad Herennium* and the *De Inventione*, the two texts do appear to have had a common source but who or what this is still speculative.

¹ Important discussions of the *Rhetorica ad Herennium* are: Marx (1894); Herbolzheimer (1926); Golla (1935); Caplan (1954); Adamietz (1960); Douglas (1960); Barwick (1961); Gelzer (1962); Bione (1965); Calboli (1965), (1969), (1972); Gotoff (1973); Ungern-Sternberg (1973); Achard (1989); Sinclair (1993); Müller (1994), (1996); Deneire (2004); Krostenko (2004); Masiello (2006).

As I will show, these debates about the context of the *Rhetorica ad Herennium* have reached workable conclusions, but these conclusions have not been put to use. By placing the examples and other content into this contextual framework, they begin to take on a greater meaning. In fact, there are many different lines of enquiry about the text that remain to be explored. As I will argue in the remainder of the thesis, the range of examples and subjects discussed within the text means that the *Rhetorica ad Herennium* can lead to a greater understanding of first century BCE Rome across the fields of history, politics, law and rhetorical education.

The author

The anonymity of the *Rhetorica ad Herennium* has long been a barrier to better understanding the text. Understandably, an author and their authority are often seen as an essential starting point for analysing a work, for relating to it, for finding out the who, why, and what. Other ancient texts with unknown authors, often known as *pseudepigrapha*, have suffered a similar fate.² But the *Rhetorica ad Herennium* is not a work that ever intended to deceive; rather it is the victim of a misunderstanding.³ I intend to show throughout this thesis that the text can (and should) still be used to ask and answer important questions, and by doing so the image of the author becomes ever clearer.

At some point in antiquity, the text now known as the *Rhetorica ad Herennium* became associated with Cicero; Jerome refers to it as written by him in the early fifth century CE.⁴ It was not until the fifteenth century that commentators such as Raffaele Regio began to

² See now Peirano (2012), who provides a very accessible introduction and overview of the scholarship and theory surrounding *pseudepigrapha*. See for example Gudeman (1894); Clift (1945) esp. 79-122; Syme (1971) 3-17; Cerri (2000); Martinez (2011), (2014). Meltzer (1994) and Genette (1997) 37-54 discuss the importance of an author in social and paratextual terms.

³ Paratore (1971) 640 describes this as a 'pseudofalso', where a text becomes confused with a better-known work through no fault of the author (with particular reference here to the beginning of Horace *Sat.* 1.10). Paratore's discussion is a thorough chronological and typological discussion of different types of *pseudepigrapha*.

⁴ Jer. *C. Ruf.* 1.16 (CCSL 79 p. 14 lines 4-5), *In Abd. prol.* (CCSL 76 p. 350 lines 53-7). There are also later references to the work being by Cicero in Rufinus (*Rhet. Lat. Min.* p.577, 584) and Priscian (*Gramm. Lat.* [Hertzius] p.95 l.15, 19, p.96 l.17).

argue, as is now accepted, that Cicero was not the real author.⁵ However, the result of this misattribution to Cicero is that the real authorship is lost.

The only source of possible external evidence for the identity of the author is Quintilian, another rhetorician writing in the first century CE. At six points in his text, Quintilian quotes from an author called Cornificius, using examples from him and referring to the rhetorical techniques and terminology he discusses.⁶ Some of the references that Quintilian attributes to Cornificius correspond directly to sections of the *Rhetorica ad Herennium*. For example, there is a figure of speech in the *Rhetorica ad Herennium* named *licentia*, which Quintilian also attributes to Cornificius.⁷ When Quintilian is discussing additional figures of speech,⁸ he says that Cornificius adds *interrogatio*,⁹ *ratio cinatio*,¹⁰ *subiectio*,¹¹ *transitio*,¹² *occultatio*,¹³ *sententia*,¹⁴ *membrum*,¹⁵ *articuli*,¹⁶ *interpretatio*,¹⁷ and *conclusio*,¹⁸ which do all appear in the *Rhetorica ad Herennium* at the places noted.

However, Quintilian makes other references to Cornificius that are less securely connected to the *Rhetorica ad Herennium*. Quintilian is discussing Arguments when he mentions that Cornificius calls a *conclusio ex consequentibus* a *contrarium*.¹⁹ The term *contrarium* does appear in the *Rhetorica ad Herennium* in several places but only in connection with a Figure of Diction, not Arguments.²⁰ Similarly, whilst discussing *finitio* as an aspect of

⁵ See Murphy and Winterbottom (1999) for the text of Regio's *Quaestio* and further references. Marx (1894) 61-9 reviews significant commentators and editions from the 15-19C. See Monfasani (1987) 112-5 on the mistaken idea (found in Marx and Caplan) that Lorenzo Valla was the first to doubt the Ciceronian authorship.

⁶ These are Quint. *Inst.* 3.1.21, 5.10.2, 9.2.27, 9.3.71, 9.3.98. Caplan (1954) ix-xii reviews the evidence briefly but systematically.

⁷ Quint. *Inst.* 9.2.27.

⁸ Quint. *Inst.* 9.3.98.

⁹ *Rhet. Her.* 4.15.22.

¹⁰ *Rhet. Her.* 4.16.23.

¹¹ *Rhet. Her.* 4.23.33.

¹² *Rhet. Her.* 4.26.35.

¹³ *Rhet. Her.* 4.27.37.

¹⁴ *Rhet. Her.* 4.17.24.

¹⁵ *Rhet. Her.* 4.19.26.

¹⁶ *Rhet. Her.* 4.19.26.

¹⁷ *Rhet. Her.* 4.28.38.

¹⁸ *Rhet. Her.* 4.30.41.

¹⁹ Quint. *Inst.* 5.10.2. I have used the English translations of the Latin rhetorical terms as found in H. Caplan's Loeb edition of the *Rhetorica ad Herennium* (Caplan [1954]). I capitalise these terms throughout the thesis for clarity.

²⁰ *Rhet. Her.* 4.28.25 and see e.g. 4.13.18, 4.43.56.

circumspectio Quintilian says that Cornificius considers *finitio* a Figure of Speech.²¹ *Definitio* does appear in the *Rhetorica ad Herennium* as a Figure of Speech, but the term is slightly different and in this case it stands alone rather than in the context of *circumspectio*.²² Quintilian also uses two examples in his description of *traductio* that are found in the *Rhetorica ad Herennium* and mentions Cornificius at this point, but in the *Rhetorica ad Herennium* only one of the examples is found illustrating *traductio* and the other is an example of *adnominatio* instead.²³ Quintilian uses these as *exempla vitandi*, examples to avoid, in contrast to the author who presents them positively. These differences and inconsistencies begin to make the association with Cornificius less certain.

Furthermore, there are some references that seem to rule out the association altogether. The references from Quintilian's text that can be matched to the *Rhetorica ad Herennium* only come from what is now Book 4 of the anonymous text (although it may not always have been divided this way),²⁴ suggesting that Quintilian did not have access to the text as a whole. This impression is strengthened by the fact that Quintilian names Cornificius as one of the authors who have written in detail specifically about Figures, which is the subject of Book 4 of the *Rhetorica ad Herennium*.²⁵ Quintilian gives *dubitatio* and *correctio* as examples of two Figures that are analysed at length by Cornificius and the other named authors, but the author of the *Rhetorica ad Herennium* devotes only a sentence or two of explanation to each.²⁶ Additionally, three of the other men mentioned (Caecilius, Dionysius and Rutilius) are known to have been writing under Augustus, which appears to place Cornificius in that time period too. Elsewhere in the text, Quintilian also seems to associate Cornificius with later writers. In the list of writers of *rhetorica*, Quintilian places him after Cato, Antonius and Cicero and just before authors from the Augustan period and beyond.²⁷ T. Adamik and others have argued that Quintilian's lists are not always arranged in chronological order so this argument is not conclusive,²⁸ yet at face value the list does seem to be arranged chronologically. It is only the attempt to connect Cornificius and the *Rhetorica ad Herennium* that creates doubts. The association of Cornificius with writers from the early Imperial period seems to be a strong argument against identifying him as the

²¹ Quint. *Inst.* 9.3.91.

²² *Rhet. Her.* 4.35.35.

²³ *Rhet. Her.* 4.14.21 (*traductio*), 4.21.29 (*adnominatio*). Quint. *Inst.* 9.3.71.

²⁴ Marx (1894) 4-5.

²⁵ Quint. *Inst.* 9.3.89.

²⁶ *Rhet. Her.* 4.29.40 and 4.26.36 respectively.

²⁷ Quint. *Inst.* 3.1.19. Calboli (1969) 5 suggests that this is actually an indication from Quintilian regarding the respective dates of *De Inventione* and the *Rhetorica ad Herennium* (for which, see below).

²⁸ Adamik (1998) 285 with reference to Stangl (1910); Calboli (1965) 41. See also Adamietz (1966) *ad loc.*

author of the *Rhetorica ad Herennium*, which scholars agree should be dated to the first half of the first century BCE.²⁹

The parallels between the *Rhetorica ad Herennium* and the work of Cornificius are important, however, as they at least suggest that the two works were part of the same rhetorical tradition. This possibility gives the author's text a wider resonance and perhaps longevity through the first century. Equally, given the potential for conservatism among rhetorical handbooks, this may not be surprising or unique. It may be that if the remaining books of Cicero's *De Inventione* existed, they would have contained the same terminology and examples as well.

Although there are scholars, such as Calboli,³⁰ who strongly advocate the identification with Cornificius it is in any case of limited use: there is little further information about a Cornificius from the early first century BCE.³¹ Despite this, one major benefit of accepting Cornificius as the author of the *Rhetorica ad Herennium* would be to say that (a part of) his text was known to Quintilian and, presumably, by others in antiquity. It would be possible to draw a similar conclusion from the quite extraordinary survival of the text in full, but discounting Quintilian's awareness of the text does mean that there is a long period between the early first century BCE and the time of Jerome where its transmission is simply unknown.³²

Internal evidence, then, is the only sure way to build a picture of the author of the *Rhetorica ad Herennium*. However, some scholars have argued that the text is actually the

²⁹ See below for further debate and more precise dating.

³⁰ For the argument strongly in favour of Cornificius, see Calboli (1965) 1-57 and Calboli (1969) 3-11.

³¹ As Caplan (1954) xii n.a notes. Calboli is perhaps wrong to look for 'un personaggio ben noto' ([1969] 6). Apart from the Cornificius named by Quintilian (*RE* 1, if he is a separate individual to those who follow), there are several Cornificii throughout the first century who are briefly referenced, for example one was thought to be a competitor for the consulship in 65 BCE (Cic. *ad Att.* 1.1.1; *RE* 7). Cicero mentions a Cornificius who was a scribe for Verres during his urban praetorship (Cic. *Verr.* 1.150; *RE* 2) and there is also a Cornificius who was friends with Caesar and Catullus (see, for example, *B Alex* 42.2.2; Cat. 38.1; *RE* 8). Calboli changes his mind about which Cornificius he thinks is the author of the *Rhetorica ad Herennium* between 1965 and 1969 (see [1969] 9), claiming in the latter work that the author is the Cornificius named as an etymologist cited by Macrobius (*RE* 11; *Sat.* 1.9.11, 1.17.9, 1.17.33, 1.17.62, 1.23.2, 6.4.12, 6.5.13), and Festus (Paul. Fest. p.123 1; Fest. p.166b 27, p.170b 26, p.182a 15, p.194b 11, p.217b 18-9, p.282a 23-4, p.359b 10 [Müller]).

³² Although Marx suggests that the work was rediscovered in the mid-fourth century, other commentators have refrained from speculating on the survival of the text: Marx (1894) 1-2. See also Calboli (1993).

product of several authors because of perceived inconsistencies and changes in style or manner.³³ Besides the evidence to the contrary, the idea that there is not one unknown author but possibly three is another unhelpful suggestion that would make working with the text significantly more difficult.³⁴ Müller argues from these inconsistencies that the author is a thoughtless and uncritical writer,³⁵ but in what follows I hope to show why both of these arguments do not hold.

In fact, by looking at the prefaces and conclusions to each book,³⁶ it is clear that the four books of the *Rhetorica ad Herennium* were conceived of as a single project by the author. Certain themes recur such as the author's other occupations, his attempt to write quickly for Herennius' benefit, and his belief in practising.³⁷ The preface to Book 2 is a particularly good example of how the author looks forwards and backwards at the same time, linking each book together in a logical way.³⁸

In Book 1, Herennius, I briefly went through the causes that the orator should deal with, the duties of the theory that it is appropriate to work on, and the way that he can most easily fulfil these duties.

Moreover, as it was not possible to discuss everything at the same time and I had to write about the most important things first, so the rest would seem easier for you to understand, I therefore decided that I would write primarily about the things that were most difficult.

There are three types of causes: Epideictic, Deliberative, and Judicial. The most difficult is Judicial, hence I will deal with that first. I did this in the previous book too, when I discussed the five functions of an orator. Of these Invention is the first and most difficult. I will also have nearly dealt with that in this book; a few details will be carried over to Book 3.

These notices also reveal the author's working method, writing one book at a time and then sending it straight on. At the end of Book 1, the author says that if the books are completed

³³ Perez Castro (1999) with further references.

³⁴ As suggested by Perez Castro (1999) 258-9.

³⁵ Müller (1996) 71-83.

³⁶ As Calboli (1969) 42-6 does.

³⁷ As in *Rhet. Her.* 1.1.1, 1.17.27, 2.31.50, 3.1.1, 3.24.40, 4.56.69.

³⁸ *Rhet. Her.* 2.1.1: *In primo libro, Herenni, breviter exposuimus, quas causas recipere oratorem oporteret, et in quibus officiis artis elaborare conveniret, et ea officia qua ratione facillime consequi posset. Verum, quod neque de omnibus rebus simul dici poterat et de maximis rebus primum scribendum fuit, quo cetera tibi faciliora cognitu viderentur, ita nobis placitum est, ut ea, quae difficillima essent, potissimum conscriberemus. Causarum tria genera sunt: demonstrativum, deliberativum, iudiciale. Multo difficillimum iudiciale est; ergo id primum absolvemus. Hoc et priore libro egimus cum de oratoris officiis quinque tractaremus. Quorum inventio et prima et difficillima est. Ea quoque nobis erit hoc libro propemodum absoluta: parvam partem eius in tertium volumen transferentur.*

too slowly for Herennius' studies, he should attribute that to the author's other tasks.³⁹ Any inconsistencies in the text may be explained by his professed haste in completing the task for Herennius and his passing on of the text as soon as he had finished it.⁴⁰ However, I would also suggest that it is incorrect to apply a modern standard of consistency to the text, particularly when the author claims to be translating terminology for the first time.⁴¹ Although the preface to Book 4 is notably different, as I will discuss shortly, the conclusion to Book 4 again contains these same themes:⁴² the text is bookended, and indeed unified, by the author's ideas and intentions.

Another feature of the text that can reveal something about the author is his attitude towards Greek scholars. In the first paragraph of the work, he expresses his interest in philosophy and his disinterest in simply following the precedent of previous (Greek) authors (*Graeci scriptores*).⁴³ This is because he thinks they have overcomplicated things for the sake of appearing important. Nevertheless, the implication is that he considers these Greek writers to be his direct predecessors. To some extent, the continued dominance of these Greek writers and their apparently unhelpful style of writing is implied by the author's need to refute them at this initial stage. The author makes a point here to signal his divergence from the Greek tradition, as he continues to do at other significant moments in the text.⁴⁴ A. Corbeill argues that this general attack on Greek writers is necessary in the historical context.⁴⁵ Greek writers cannot be ignored, but recognising their influence would be a 'threat to the convergence of moral and political authority at Rome'.⁴⁶ As W. W. Fortenbaugh argues in the case of Cicero, his discussions of earlier Greek authors enable him to present himself as an 'independent thinker' with the authority to improve upon the work of someone as influential as Aristotle or Theophrastus.⁴⁷

³⁹ *Rhet. Her.* 1.17.27.

⁴⁰ E.g. *Rhet. Her.* 2.31.50.

⁴¹ *Rhet. Her.* 4.7.10. By contrast, Achard (1994) 27 praises Cicero, who 'tries to banish monotony' in *Inv. rhet.* by changing the order of the *constitutiones* from Books 1 to 2.

⁴² *Rhet. Her.* 4.56.69.

⁴³ *Rhet. Her.* 1.1.1.

⁴⁴ Marx (1984) 129 compares the *Rhetorica ad Herennium* to the *togata* form of Roman comedy (Greek tradition wearing Roman garb), whereas *De Inventione* is the *palliata*, emphasising the two authors' different approaches to acknowledging (or not) their Greek sources. Cf. Corbeill (2002) 35.

⁴⁵ Corbeill (2002) 41.

⁴⁶ Corbeill (2002) 42.

⁴⁷ Fortenbaugh (2005) 41. See Crawford (1978); Connolly (2007) for Greek rhetoric in Rome.

The author does not tend to name Greek sources or influences, but he does denounce their treatment of Amphibolies as well as their use of word lists for memorising and, importantly, their approach to using examples (*exempla*).⁴⁸ At each of these points, the author is careful not to simply denounce Greek practice or Greek rhetoric in general; instead he always justifies his disagreements with his predecessors thoroughly. The reasons that he gives demonstrate his own approach and his belief in a practical and useful result. His references to his interest in philosophy suggest engagement with the Greek world,⁴⁹ but he is also able to be critical where necessary.

One of the most significant moments in the text is the author's rejection of the Greek practice of using examples.⁵⁰ In the introduction to his longest and final book,⁵¹ the author goes to great lengths to distance his own practice from that of Greek writers (*consuetudo Graecorum*). This section is itself highly rhetorical, demonstrating the author's style of argumentation.⁵² He begins by giving several factors in favour of the Greek practice, but then warns that they are only influential because of the Greeks' reputation (*auctoritas*) rather than the truth (*veritas*).⁵³ He then goes on to answer these arguments with several of his own,⁵⁴ before proposing an alternative: either, all borrowed examples should come from the same author,⁵⁵ or, preferably, the rhetorician would invent them himself.⁵⁶ But despite the author's protestations, the unavoidable influence of 'the Greeks' is evident: while the author distances himself from them here he also implies that, everywhere else, he is following Greek theory.⁵⁷

⁴⁸ *Rhet. Her.* 2.11.16 (*amphiboliae*), 3.23.38 (*memoria*), 4.1.1-7.10 (*exempla*) – see below.

⁴⁹ *Rhet. Her.* 1.1.1, 4.56.69. For the author's interest in philosophy see Marx (1894) 83-4; Calboli (1969) 32-4. Cf. Corbeill (2002a) 36-43.

⁵⁰ See Barwick (1961), who sees Hermagoras' influence in this argument and the parallel one of Cicero (*Inv. rhet.* 2.1.1-2.4).

⁵¹ *Rhet. Her.* 4.1.1-7.10.

⁵² See Gunderson (2009).

⁵³ *Rhet. Her.* 4.1.1-2.4.

⁵⁴ *Rhet. Her.* 4.3.4-4.7.

⁵⁵ *Rhet. Her.* 4.5.7-5.8.

⁵⁶ *Rhet. Her.* 4.6.9-7.10.

⁵⁷ Herbolzheimer argues that Cicero has the same attitude towards Hermagoras. He suggests that Cicero's arguments and protests about not using Hermagoras at certain points would only make sense if he were using him as a source elsewhere: (1926) 397, 400-1.

The author ends this section with an acknowledgement of the Greeks as inventors of the art of rhetoric before specifying that, despite this, he has not followed their theory.⁵⁸ Instead, the implication is that he will devise his own examples, as he thinks is best. However, when reading the text that follows it is clear that his claim should not be understood literally.⁵⁹ Rather than create all his examples from scratch, it seems that the author has adapted the ones he used from elsewhere.⁶⁰ The result of the adaptation would then, in the ancient world, have merited the claim of originality.⁶¹ This perceived ‘lie’ of the author’s has damaged his credibility in the eyes of some scholars.⁶² Yet his ability to disagree with his predecessors and claim originality for his examples is better understood as a reflection of his claim to authority, which is evident throughout the text.⁶³

This connects to other aspects of the author’s identity such as his age and social standing. Although for some time scholars interpreted the *Rhetorica ad Herennium* as the lecture notes of a young man,⁶⁴ it is now common to accept the author as an older, experienced practitioner.⁶⁵ Indeed, the very fact that Herennius has chosen to ask him for advice *de ratione dicendi* suggests that the author has a claim to expertise on the subject.⁶⁶ Additionally, the author expresses an interest in writing further handbooks (*artes*) on state administration, the military, and memory suggesting he also considered himself knowledgeable about those topics.⁶⁷

On the basis of his rhetorical knowledge and his other interests in the text, G. Achard infers that the author played an important role in the Social War and had a political career; Achard thinks it is highly likely that the author is a senator.⁶⁸ And yet, despite the estimation of Herennius and his own self-acknowledged ability, the author does not lay

⁵⁸ *Rhet. Her.* 4.7.10: *His de causis, cum artis inventionem Graecorum probassemus, exemplorum rationem secuti non sumus* (‘For these reasons, although I approve of the Greeks’ invention of the art, I have not followed their theory of examples’).

⁵⁹ I discuss this in more detail in Chapter 3.

⁶⁰ Caplan (1954) xxxi-ii.

⁶¹ Caplan (1954) xxxi-ii; Adamik (1998) 271.

⁶² Marx (1894) 114; Barwick (1961) 300-14; Ungern-Sternberg (1973) 149-52; Calboli (1969) 42-6. See Wiseman (1993) for ‘lying historians’.

⁶³ Sinclair (1993) 568 describes the rewriting of examples as ‘creative quotation’ and argues that it is an important teaching point.

⁶⁴ Marx (1894) 75-6, 80-3, 86-90 discusses his puerile style; Douglas (1956) 135 (review of Caplan [1954]).

⁶⁵ Caplan (1954) xxii-iii; Achard (1989) xxviii.

⁶⁶ *Rhet. Her.* 1.1.1.

⁶⁷ *Rhet. Her.* 3.2.3, 3.16.28.

⁶⁸ Achard (1989) xxviii, xxxi.

claim to a recognised Roman status or title. He does not present himself as a Roman magistrate or a Roman senator and there are few references to senatorial oratory. Although it is an argument from silence, the importance attached to these labels by Roman society might suggest that this is evidence in itself that he was a member of senatorial elite. He may well be an equestrian, however, as he has free time (*otium*) to develop interests such as rhetoric and philosophy.⁶⁹

The author's relationship with the addressee Gaius Herennius is also a potential line of inquiry. The author's choice to frame the work with the address to Herennius may reflect a broader trend across several genres of literature towards a more intimate and personal style. Many of the historiographical works of the later second century were addressed to a friend in the form of a letter, as were several autobiographies of this period and later.⁷⁰ Lucilius also addressed his Satires to people he knew, including a friend who had not visited him during illness (V, Satire I), a certain Pacenius (XI), and a friend who he wanted to discourage from writing ancient history (XXVI, Satire 5). The earlier writer, Cato the Elder, wrote books for his son Marcus, although it is not clear what form these took. E. Gruen, for example, is doubtful that the fragments attributed to the so-called *Libri ad M. Filium* formed a 'carefully composed' text.⁷¹ As G. Kennedy notes, a series of later authors including Cicero, Quintilian and Tacitus also follow this practice of addressing a work to a close friend or relative.⁷²

Addressing the work to Herennius does raise the question of whether the author meant the work to be made public. However, as Achard notes, at certain points the author explicitly refers to other readers of the text, as in his discussion of different types of Memory. Here, he suggests that those with a naturally strong memory may not need assistance, but 'a good reason could be given for why we would want to be a help to those who have less natural talent'.⁷³

⁶⁹ As Gelzer (1962) 216 suggests; Pina Polo (1996) argues he is a *homo novus*. See also Sinclair (1993) 565.

⁷⁰ See Gratwick (1982b) 147. For autobiographies, see also Chassignet (2004); Flower (2008); Scholz and Walter (2013); Flower (2014). For Cicero's autobiography see Steel (2012) and the discussion in Chapter 7.

⁷¹ Gruen (1992) 77. Cf. Schmidt (1972).

⁷² Kennedy (1994) 122.

⁷³ *Rhet. Her.* 3.16.29. Achard (1989) xiii. Müller (1996) 76 disagrees, arguing that the author copied another text without thinking about whether it was relevant or not.

There is a certain amount of information about the relationship between the author and Herennius contained in the prefaces and conclusions, as discussed above. It is clear from these references that the author is intent on helping Herennius and that he expects to spend time with him in addition to the time spent on writing the text; as he says in the final paragraph: ‘we are pleased to practise together because of our friendship’.⁷⁴ This friendship, he says, grew out of their blood relationship (*cognatio*) and is based on a shared love of philosophy.⁷⁵ The author also implies at the end of the work that Herennius will not have to rely on public speaking, but that it will be beneficial, which might suggest that Herennius’ main focus or career already lies elsewhere.⁷⁶

Outside the text, Herennius himself remains an unknown figure, although members of the Herennii *gens* are mentioned in the sources around this period.⁷⁷ Several Herennii are elected as magistrates and there is also a historic connection to Marius, as mentioned by Plutarch.⁷⁸ However, the relative importance of the Herennii does not help to identify specifically the Herennius addressed here, who may or not be connected to this strand of the family.

Despite the lack of other information, the connection of the Herennii to Marius has been used to make assumptions about their political leanings and those of the author too.⁷⁹ Coupled with the general impression given by the author’s examples, this has contributed to debates about whether or not the author is a *popularis*.⁸⁰ However, as recent work has repeatedly shown, the term *popularis* is very difficult to define and use with certainty.⁸¹ The author does not use the term *popularis* (although he does refer to what is usually seen

⁷⁴ *Rhet. Her.* 4.56.69: *nam et simul libenter exercemur propter amicitiam*. See also 3.1.1.

⁷⁵ *Rhet. Her.* 4.56.69. This existing interest in philosophy might suggest that Herennius was an older student as philosophy was not studied at a high level until after rhetoric, see Bonner (1977) 85-7. Although see Clarke (1968) 21 referring to Cicero’s early philosophical education (without references).

⁷⁶ *Rhet. Her.* 4.56.69. For more on the relationship between teacher and student, see Chapter 7.

⁷⁷ One Gaius Herennius, a tribune, opposed Sulla in 80 BCE; a Gaius Herennius was convicted for extortion in the early 70s BCE; and a general named Gaius Herennius was killed in Spain in 75 BCE as part of Sertorius’ army. As Kennedy (1994) 122 notes, they may or may not be the same person; see *RE* 7.

⁷⁸ There was a praetor named Herennius in 96 BCE and a consul with the name in 93 BCE (see *RE* 10, M. Herennius M. f. – n., perhaps also a *monetalis* c.101 BCE). There was also a Herennius as quaestor in 90 BCE (see *RE* 41, M. Herennius M. f. Rufus). See Plut. *Mar.* 5 for a reference to Marius’ clientship of the Herennii.

⁷⁹ As in Calboli (1969) 34-42. See discussion in Kaster (1995) *ad.* 26.1.

⁸⁰ For the major positions, see: Marx (1894) 141-53; Gelzer (1962); Calboli (1965) 57-102; Ungern-Sternberg (1973).

⁸¹ See Wiseman (2009); Robb (2010); Arena (2012) 128; Kaplow (2013).

as its opposite, *optimates*)⁸² or self-define as such as far as the text is concerned. As a result, it is not clear what it would mean in ancient terms to say the author is *popularis*, especially if he is not politically active, and whether this would be a reference to *popularis* politics, *popularis* oratory, or something else.⁸³

To summarise, then, I argue that the evidence in favour of Cornificius is not wholly conclusive, so while accepting the possibility of his authorship I will continue to call the author ‘Auctor’ in the remainder of the thesis. Internal evidence strongly suggests that there was only one author, who was an experienced practitioner in rhetoric and other subjects too. It does not seem that he was a Roman magistrate although he was connected in some way with a branch of the Herennii who achieved relatively high status in the early first century BCE. His political leanings continue to be a point of interest but cannot simply be labelled ‘*popularis*’.

Dating of the *Rhetorica ad Herennium* (and Cicero’s *De Inventione*)

Reconnecting a text with its historical context can provide insights into both, and this is a major aim of my thesis. The examples used by the Auctor in the *Rhetorica ad Herennium* are particularly useful in providing historical insights and discussion points. Where possible, these examples have been used to date the text, but not everyone agrees with this methodology. As a result, the debate about the dating of the *Rhetorica ad Herennium* means that the historical context of the text is also in question. However, since K. Marx, the majority of scholars have agreed that the text should be dated between 86-82 BCE and I argue that this dating should continue to be accepted.⁸⁴

This dating is based on internal evidence; the history of rhetorical teaching in Rome; and the text’s relationship with the *De Inventione*, which I will discuss in detail in the next section. Internal evidence gives 86 BCE as the *terminus post quem* because the latest event

⁸² *Rhet. Her.* 4.34.45.

⁸³ I discuss this problem further in Chapter 4.

⁸⁴ In support of this date: Marx (1894) 153-5; Bione (1965) 11-2; Caplan (1954) 24; Adamietz (1960); Levi (1966) 360; Calboli (1969) 12-7; Calboli (1982) 89 n.1; Achard (1989) 6-13; Adamik (1998) 272; Müller (1994) 5.

mentioned in the text is Marius' seventh consulship of that year.⁸⁵ It is important to emphasise and acknowledge this as one certainty about the text, which must have been completed after this date. Other events close to this date that are mentioned in the text are the tribunate and death of Publius Sulpicius (88 BCE) and the Social War (91-88 BCE).⁸⁶ The Auctor also gives a chronological list of important orators in his preface to Book 4,⁸⁷ which ends with Crassus and Antonius, who died in 91 and 87 BCE respectively.

A *terminus ante quem* is, however, harder to decide upon. The lack of reference to Sulla's dictatorship has led to the dating before 82 BCE,⁸⁸ but others such as M. Henderson have suggested that it should be in 75 BCE, when C. Herennius dies in Spain as part of Sertorius' army.⁸⁹ As discussed in the previous section, the identification of the addressee with this particular C. Herennius is by no means certain.

A. Douglas has argued for a more drastic shift to the traditional dating: he suggests that the *terminus ante quem* could be pushed as far as the 50s BCE.⁹⁰ He expresses caution about dating the *Rhetorica ad Herennium* to the 80s BCE on the basis of the Auctor's use of *clausulae*. Having analysed the *clausulae*, Douglas argues that the prefaces and conclusions to each book show different rhythmical tendencies to some of the examples used and therefore they were not all written by the same person. On this point, Douglas is in agreement with most scholars, as argued above, and his findings corroborate the external evidence that shows the Auctor has taken examples from elsewhere.

To make his further argument about the date of the work, Douglas uses his analysis of the historical examples in particular. He argues that it is unlikely that the examples the Auctor did write and the ones he took from elsewhere were written at the same time. Therefore the historical examples he took from elsewhere must have been older than the ones he wrote himself, necessitating a gap between the events, the writing of the original examples, and

⁸⁵ *Rhet. Her.* 4.54.68. See Warde Fowler (1915) for the suggestion that one of the other final examples at *Rhet. Her.* 4.52.68 is a reference to Sulla's attack on the Hellespont in 84 BCE, but this is uncertain.

⁸⁶ *Rhet. Her.* 3.2.2, 4.22.31 and elsewhere.

⁸⁷ *Rhet. Her.* 4.5.7.

⁸⁸ See also the reference to senators and equestrians on the same jury at *Rhet. Her.* 4.35.47, which was no longer the case following Sullan legislation.

⁸⁹ Henderson (1951) 73 and n.18.

⁹⁰ Douglas (1960) 77 and (1973), the latter is his review of Calboli (1969). He is followed by Winkel (1979).

the Auctor's use of them. When the Auctor does seem to have composed historical examples himself about, for example, the Social War, Douglas sees this as the Auctor 'returning to a stock theme familiar in his youth' and building on existing exercises.

However, Douglas' assumption that the Auctor could not have been working with multiple accounts of contemporary events is unfounded. In fact, it does not seem strange that exposure to comments, discussions and speeches about daily occurrences could immediately inspire the creation of a rhetorical example, or the adaptation of an old exercise, particularly in a teacher of rhetoric. Cicero's presentation of his own rhetorical education would certainly suggest that even a student could spend time each day listening to speeches in the forum and follow this with rhetorical exercises in response to what he had heard.⁹¹ Additionally, two of the most pertinent references to the Social War take the form of deliberative questions and are not analysed by Douglas. These references do not need to be attributed to an intermediary source but could have been plucked straight from the senate's discussion at the time.⁹² As such, Douglas' suggestion that there must have been a gap of decades between the production of exercises or examples by other commentators and the additions by the Auctor appears unnecessary.

Cicero's references in the *De Inventione* also show that it was possible to incorporate recent events into rhetorical theory at a distance of only seven years or so. Douglas himself notes the fact that Cicero describes a legal case (the *causa Curiana*) of 92 BCE, although he says that the latest 'important' political event mentioned is in 106 BCE (a reference to Quintus Servilius Caepio's proposal of a *lex iudiciaria*).⁹³ For this reason, Douglas is surely too hasty when he says: 'The common assumption that the *terminus post quem* of 87 BCE is also a *terminus haud multo post quem* is plainly invalid in the absence of supporting evidence'.⁹⁴ By contrast, I argue that the *terminus post quem* and the similarities with *De Inventione* are important. I also maintain that it would be strange for a work written 10 or even 30 years later to be so influenced by the events surrounding the Social War with no mention of what follows, and to bear such similarities to the rhetorical

⁹¹ Cic. *Brut.* 305. See Frazel (2009) 39.

⁹² *Rhet. Her.* 2.28.45, 3.2.2.

⁹³ Douglas (1960) 77 n.4, see Cic. *Inv. rhet.* 1.49.92. In fact, Cicero also uses as examples Popilius' defeat in 107 BCE (Cic. *Inv. rhet.* 2.24.72; cf. *Rhet. Her.* 1.15.25, 2.14.21), Malleolus' conviction for parricide in 101 BCE (Cic. *Inv. rhet.* 2.50.148; cf. *Rhet. Her.* 2.12.18), and Crassus' demand for a triumph in 95 BCE (Cic. *Inv. rhet.* 2.37.111).

⁹⁴ Douglas (1960) 75.

theory of the 80s BCE as found in *De Inventione*.⁹⁵ The cluster of references to the late 90s and early 80s BCE strongly suggests that the *Rhetorica ad Herennium* is a product of these years or those immediately following.⁹⁶

The *Rhetorica ad Herennium* also seems to fit within this specific period of rhetorical teaching in Rome. The Auctor suggests that he is the first to translate Greek rhetorical terms into Latin,⁹⁷ which implies that he is writing at an early date before Latin rhetorical teaching and the terms used had become standardised. Antonius' recent *libellus* on rhetoric, which I discuss below as a possible common source, may also have been influential. The Auctor's decision to write a handbook instead of only teaching orally has been connected to the decree of 92 BCE against Latin rhetors (*rhetores Latini*) documented by Suetonius.⁹⁸ This decree was passed by the censors of that year, one of whom was the famous orator Crassus. The motive behind this decree has been debated but seems to have been connected to the school opened by Lucius Plotius Gallus.⁹⁹ As Achard suggests, the response to the decree may have been a situation in which rhetorical teaching in Latin had to be done more covertly,¹⁰⁰ but the evidence of the *Rhetorica ad Herennium* and the *De Inventione* confirms that it was not entirely suppressed. A new school for Latin rhetoric was apparently opened in Rome in 81 BCE.¹⁰¹ Taking these two dates into account, the decade 91-81 BCE is a logical time in which a rhetorical handbook could have been written to fill a gap in provision. As I will discuss later, there are also other possible reasons for the Auctor to have written at this time and in this mode.

The dating of Cicero's *De Inventione* is also much debated, although within a smaller timeframe than the *Rhetorica ad Herennium*. There are fewer references to recent history than in the *Rhetorica ad Herennium*,¹⁰² so they have played a less important role in fixing the date of the text. Instead, discussions about the dating have revolved around Cicero's description of it in *De Oratore* and Cicero's age and rhetorical education around this time.

⁹⁵ In Cicero's *De Oratore* and *De Re Publica*, the only surviving works from a similar period that are set in a previous era, Cicero introduces the work in his own voice (*De or.* 1.1.1-6.23; *Rep.* 1.1-13). This might suggest that such a device needed to be explained to the reader and was not usual practice.

⁹⁶ See also Achard (1989) xii-iii.

⁹⁷ *Rhet. Her.* 4.7.10.

⁹⁸ See Achard (1989) ix-x. Suet. *Rhet.* 25.2.

⁹⁹ I discuss the debate surrounding the *rhetores Latini* further in Chapter 1.

¹⁰⁰ Achard (1989) ix-x, (1994) 9-10, followed by Negri (2007) 186-7.

¹⁰¹ Jer. *Chron.* 174.4. See also the discussion in *FRHist* 29 (M^o. Otacilius Pitholaus).

¹⁰² As I will show in Chapter 3.

In *De Oratore*, written in 55 BCE, Cicero belittles his past attempt at a rhetorical handbook and the strict rhetorical system that it exemplified.¹⁰³ He describes the work as that of a *puer* or *adulescentulus* and Quintilian, surely following Cicero's lead, later describes him as writing as an *adulescens*.¹⁰⁴ These terms are notably imprecise. Technically, a boy stopped being a *puer* when he began to wear the *toga virilis* at around 16 while the term *adulescentulus* or *adulescens* could refer to someone up to 20 years old and perhaps beyond.¹⁰⁵ Initially, Cicero was interpreted literally and scholars dated *De Inventione* to before the Social War in 91 BCE when Cicero was 15 years old (b. 106 BCE),¹⁰⁶ but the idea of the text being written by someone so young is hard to credit. Cicero's aim at this point of *De Oratore* is to make his past attempts seem infantile and mistaken, so he exaggerates his youth by using these two somewhat incompatible terms.¹⁰⁷

As Achard suggests in his commentary on *De Inventione*,¹⁰⁸ the text is more likely to have been written after the Social War when Cicero was somewhat older and undergoing further study, as he describes in the *Brutus*.¹⁰⁹ Kennedy argues that the text must have been written prior to 88 BCE because Cicero says that he gave himself up to philosophy entirely after the arrival of Philo of Larissa in Rome.¹¹⁰ On the other hand, the Rhodian scholar Molon also visited in Rome in 87 BCE,¹¹¹ which might explain the Rhodian influences and examples in the text.¹¹² Although the three years of calm during Cinna's dictatorship (86-83 BCE) would provide an opportunity for such concentrated work,¹¹³ scholars have noted that Cicero was focused on dialectic and philosophy during this period, and so may have written the text earlier as these were considered higher skills than rhetoric.¹¹⁴ This move

¹⁰³ Cic. *De or.* 1.2.5.

¹⁰⁴ Quint. *Inst.* 3.6.59.

¹⁰⁵ Cicero could describe a 19-year-old Octavian as *adulescens* and *puer* (*Phil.* 3.3; 4.3). See also Cic. *Fam.* 13.1.2, *Sen.* 4.10, *ND* 2.104, discussed by Negri (2007) 187.

¹⁰⁶ Marx (1894) 76-80.

¹⁰⁷ Pina Polo (1996) 72; Negri (2007) 188.

¹⁰⁸ Achard (1994) 6-10.

¹⁰⁹ See Cic. *Brut.* 305-10 for Cicero's autobiographical account of his education, which I return to in Chapter 7.

¹¹⁰ Cic. *Brut.* 306. Kennedy (1994) 117; Adamik (1998) 275-6.

¹¹¹ Cic. *Brut.* 307.

¹¹² Rhodians are named in three examples in *Inv. rhet.*: 1.30.47, 2.29.86, 2.32.98; Molon is named once: 1.56.109.

¹¹³ As Cicero describes Rome in *Brut.* 308 (*triennium fere fuit urbs sine armis*).

¹¹⁴ Negri (2007) 190.

away from rhetoric may have caused him to break off half way through *De Inventione*, resulting in the incomplete nature of the work.¹¹⁵

Unlike the dating of the *Rhetorica ad Herennium*, which is mainly founded on observations within the text, the dating of the *De Inventione* relies on circumstantial evidence and conjecture. Nevertheless, the evidence surrounding the texts suggests that they were both written in the 80s BCE and it is perhaps most likely that they were produced in the early part of that decade. As the historical references in the *Rhetorica ad Herennium* suggest, this was an important and turbulent period in Rome's history and these two works can and should be seen as a response to that.

The relationship between the *Rhetorica ad Herennium* and *De Inventione*

Cicero's *De Inventione* is an incomplete rhetorical handbook which, as its name suggests, only covers the first of the five functions of an orator: *inventio*. It has long been recognised that there are significant similarities between Cicero's work and the *Rhetorica ad Herennium* but the cause of these parallels is not fully understood. I argue that a common Latin source is the best way to explain the relationship between the two texts, but also that the similarities should not be overstated.

As other scholars have shown in great detail, the parallels between the *Rhetorica ad Herennium* and *De Inventione* are both general and specific in nature. There are some passages and examples that are found verbatim or in very similar terms in each text.¹¹⁶ The

¹¹⁵ Achard (1994) vii.

¹¹⁶ See for example Herbolzheimer (1926) and Adamietz (1960) for detailed side-by-side comparisons of the texts. Marx (1894) 119-33. See Achard (1989) xv; Achard (1994) 20-1 for summaries. The same examples are found at: *Rhet. Her.* 1.9.18 = *Cic. Inv. rhet.* 1.8.11; *Rhet. Her.* 1.16.27 = *Cic. Inv. rhet.* 1.3.18; *Rhet. Her.* 1.10.17 = *Cic. Inv. rhet.* 1.22.31; *Rhet. Her.* 1.11.19 = *Cic. Inv. rhet.* 2.51.153; *Rhet. Her.* 1.12.20 = *Cic. Inv. rhet.* 2.40.116; *Rhet. Her.* 1.13.23 (x3) = *Cic. Inv. rhet.* 2.50.148; *Rhet. Her.* 1.15.25 = *Cic. Inv. rhet.* 2.24.72; *Rhet. Her.* 2.12.17 = *Cic. Inv. rhet.* 2.27.53, 2.28.55; *Rhet. Her.* 2.20.32 (x2) = *Cic. Inv. rhet.* 1.43.80; *Rhet. Her.* 2.25.40 (x2) = *Cic. Inv. rhet.* 1.48.90; *Rhet. Her.* 2.22.34 = *Cic. Inv. rhet.* 1.49.91; *Rhet. Her.* 2.23.35 = *Cic. Inv. rhet.* 1.50.95; *Rhet. Her.* 2.24.37 = *Cic. Inv. rhet.* 1.50.95; *Rhet. Her.* 2.26.42 (x2) = *Cic. Inv. rhet.* 1.45.83; *Rhet. Her.* 2.26.42 = *Cic. Inv. rhet.* 1.45.84; *Rhet. Her.* 2.27.44 = *Cic. Inv. rhet.* 1.50.94; *Rhet. Her.* 2.27.45 = *Cic. Inv. rhet.* 1.50.94; *Rhet. Her.* 2.31.50 = *Cic. Inv. rhet.* 1.56.109.

overarching structure of the works is also the same, with a primary division into the three types of oratory (Epideictic, Deliberative and Judicial)¹¹⁷ and the five functions of the orator (Invention, Arrangement, Style, Memory and Delivery).¹¹⁸ A Judicial speech is then explained by detailing the six parts of a speech (Introduction, Statement of Facts, Division, Proof and Refutation, Conclusion).¹¹⁹ The possible causes of these similarities are that the Auctor copied Cicero, Cicero copied the Auctor, or they used a common source (or sources).¹²⁰

The discussion of dating above shows that neither of the first two possibilities can be ruled out definitively; the order in which the texts were written cannot be known or proved. It has been argued by Adamik that Cicero responds directly to the Auctor's arguments about examples in Book 4 but there is no way of knowing how and if Cicero could have accessed the Auctor's work.¹²¹ What Adamik interprets as a response to the Auctor could equally be a response to a common source.

Beyond these basic building blocks it is important to recognise that there are many divergences.¹²² These dissimilarities include a fundamentally different approach to *stasis* theory and the use of different terminology.¹²³ Their approach to examples is different too: not only do they choose different examples to illustrate the same parts of theory, but they also structure them in different ways.¹²⁴ As A. Braet argues, the two texts do not treat the epicheireme in the same way either, although this has not often been noticed.¹²⁵ The prefaces to the two works are very different in style and length and their positioning of Delivery and Memory is also different. These disagreements (and others) form the basis of

¹¹⁷ *Rhet. Her.* 1.2.2; *Cic. Inv. rhet.* 1.5.7. Both use the same Latin terms: *demonstrativum, deliberativum, iudiciale*.

¹¹⁸ *Rhet. Her.* 1.2.3; *Cic. Inv. rhet.* 1.7.9. Both use the same Latin terms: *inventio, dispositio, elocutio, memoria, pronuntiatio*.

¹¹⁹ *Rhet. Her.* 1.3.4 (*exordium, narratio, divisio, confirmatio, confutatio, conclusio*); *Cic. Inv. rhet.* 1.14.19 (*exordium, narratio, partitio, confirmatio, reprehensio, conclusio*).

¹²⁰ Marx (1894) 161-2 also suggested another possibility, that both went to Rhodes and heard the same speaker at different times, but this has not been seriously considered. See Herbolzheimer (1926) 391-3 for a summary of these options.

¹²¹ Adamik (1998) 273-4.

¹²² Other summaries are available, e.g. in Marx (1894) 129; Caplan (1954) xxvi n.b; Achard (1989) xvi-vii; Achard (1994) 21-3; Gaines (2007) 174-7.

¹²³ I will discuss *stasis* (or *status*) theory further in Chapter 2. For example, as seen above, the two authors use different terms for Arrangement (*divisio/partitio*) and Proof and Refutation (*confutatio/reprehensio*). In referring to the types of Introduction, the two also use different terms (*tempora/causae*), see Herbolzheimer (1926) 409.

¹²⁴ I will discuss this further in Chapter 3.

¹²⁵ Braet (2004).

much of this thesis, so I will not discuss them in detail here but return to these ideas in the relevant places throughout.

One immediate example that highlights their difference is the length of *De Inventione*. It is worth noting that despite the incomplete nature of the *De Inventione*, which means that Cicero's treatment of the four remaining functions of an orator do not survive (or, more likely, may never have been written), the work is still of a comparable length to the *Rhetorica ad Herennium*. This is largely because Cicero tends to go into greater detail than the Auctor, either adding separate sections (for example, giving fifteen *loci communes* as opposed to ten)¹²⁶ or simply explaining or discussing points of difficulty or disagreement to a greater degree than the Auctor.¹²⁷

The significant differences in the text suggest that one was not directly informed by the other, but that each took material from a common source.¹²⁸ It is likely that they then supplemented this with other sources (in Cicero's case perhaps a philosophical one)¹²⁹ or their own experiences of practice or education. As G. Herbolzheimer argues, if the source were Greek then it is unlikely that the Auctor and Cicero would have translated the information in precisely the same way, so the common source was probably in Latin.¹³⁰ I will discuss this further in the next section.

A common source for the *Rhetorica ad Herennium* and *De Inventione*

The question of the sources of the two texts is another difficult and, to some extent, unsolvable one. The Auctor's references to Greek authors have already been mentioned,

¹²⁶ *Rhet. Her.* 2.30.47-9; *Cic. Inv. rhet.* 1.53.100-54.105.

¹²⁷ Compare the explanations of *stasis* theory: *Rhet. Her.* 1.11.18; *Cic. Inv. rhet.* 1.5.7-6.9.

¹²⁸ Other scholars support this view: Marx (1894) 111-33; Herbolzheimer (1926); Adamietz (1960); Achard (1989) xlviii; Achard (1994) 20.

¹²⁹ Achard (1994) 25-6 for the presence of two different influences in *Cic. Inv. rhet.* See Braet (2004) 335-6 for the suggestion that at least one of Cicero's sources was philosophical.

¹³⁰ Herbolzheimer (1926) 396-7; Calboli (1969) 28-9. Caplan (1954) xxvii-viii draws the same conclusion but thinks that 'the differences between the two works seem to rule out a single immediate common source'. Braet (2004) 341 n.29 suggests that rather than 'one common Latin source, we seem to have a common tradition of more than one handbook', but does not explain further.

and Cicero also refers to Hermagoras, Theophrastus and Aristotle in his text.¹³¹ The influence of earlier Greek rhetorical writers and teachers cannot be denied, and I will discuss their influence on the Auctor's rhetorical theory in Chapter 2. However, these Greek writers are unlikely to have been a direct source for either text, instead a Latin source is more likely, as discussed above. Other candidates have been suggested, such as Marcus Antonius, Lucius Plotius Gallus and the *rhetoires Latini*, and the man called '*noster doctor*' by the Auctor.¹³² The issue is complicated further by the possibility that *noster doctor* refers to either Antonius or Plotius Gallus, or indeed that *noster doctor* is someone else who may or may not be the common source for the *De Inventione*.

The Auctor mentions his *doctor* when he is introducing *stasis* theory.¹³³ The theory derives from Hermagoras, but Cicero and the Auctor actually use the term *constitutio* rather than *status*, which is a direct translation of the Greek στάσις and became common later.¹³⁴ The Auctor says that while others have set out four *constitutiones*, the Auctor's teacher, *noster doctor*, argued that there were only three.¹³⁵ Cicero, on the other hand, uses four *constitutiones* in *De Inventione*.¹³⁶ This might suggest that the common Latin source also gave four, although it might also show that Cicero diverged from the Latin source and the Auctor did not, or that both authors chose to diverge from the source on this point.¹³⁷ Once again, this information does not provide much to work with.

In terms of who *noster doctor* might be, there is insufficient evidence to connect the Auctor and Plotius Gallus, although scholars have made the connection in the past via

¹³¹ Cic. *Inv. rhet.* 1.5.7-6.9, 1.9.12, 1.11.16, 1.35.61, 1.50.97, 2.2.6, 2.3.8, 2.51.156.

¹³² See Marx (1894) 150-3 (*doctor*), 141-7 (*rhetoires Latini*); Calboli (1972).

¹³³ The secondary literature does not discuss the term *doctor* for 'teacher', focusing instead on the terms such as *rhetor*, but it does not seem to be especially common. Although it is used by Cicero, it is only found in treatises, speeches, and letters from *De Oratore* (55 BCE) onwards. The relative lack of Ciceronian evidence might suggest that the Auctor's use of *doctor* was significant in itself, using a distinctly Latin term to identify himself with a Latin rhetorical tradition. The *OLD*² (*ad loc.*) notes occasions such as a reference to Greek teachers of speaking (Cic. *De or.* 1.23; *Graeci dicendi...doctores*, 55 BCE), a letter to the jurist Trebatius about teachers of civil law (Cic. *ad Fam* 7.19, 44 BCE), and to describe Plato, *doctor* of Xenophon (Cic. *Tusc.* 1.20; 45 BCE). It is also used by Quintilian, and Suetonius in *Gram. et Rhet.* See Gwynn (1926) 91 who notes Cicero's preference for *magister dicendi* over *rhetor* in *De Oratore*.

¹³⁴ I discuss this further in Chapter 3.

¹³⁵ See Quint. *Inst.* 3.6 for the other suggestions and combinations of *stasis/status* made by ancient authors.

¹³⁶ As discussed by Herbolzheimer (1926) 400.

¹³⁷ Herbolzheimer (1926) 403 emphasises that either one or both authors may be adapting the original, but argues that Cicero is deviating further while Auctor remains close to the source. I discuss this assumption further in Chapter 3.

Marius, whom Plotius Gallus is said to have taught and who knew the Herennii.¹³⁸ As the Auctor was not a student himself at the time, it is not likely that he would have attended the school of Plotius Gallus in the late 90s BCE; it is more likely perhaps that the Auctor was a *rhetor Latinus*, but that is entirely speculative.¹³⁹ Although Plotius Gallus is said to have written speeches for others and a work on physical movement (*gestus*),¹⁴⁰ there is no mention of a full work on rhetorical theory. Hence there is no evidence to support the idea of him being the common source either.

More constructively, there is positive evidence for a connection between Antonius and the Auctor's rhetorical system. Cicero's *De Oratore* mentions a *libellus* or *commentarius* written by Antonius and the *Brutus* refers to a *libellus sane exilis*.¹⁴¹ As the *De Oratore* is set in 91 BCE, the suggestion is that Antonius' work was written before that date but it is hard to be more precise. Quintilian places an *ars* of Antonius, presumably the same text, into his summary of the history of rhetorical handbooks and authors.¹⁴² Quintilian goes on to discuss the three *status* (as he terms *constitutiones*) that were proposed by those who followed on from Antonius (*secuti Antonium*): *factum non factum*, *ius iniuria* and *bonum malum*.¹⁴³ These are, in essence, the same as those used by the Auctor and his *doctor*.¹⁴⁴ From this, it has been argued that Antonius had a direct or indirect influence on the Auctor's work. Calboli also suggests that Antonius' influence is evident on other parts of the Auctor's work including the focus on *exercitatio*, the doctrines of *status* and Figures, and the approach to Memory and Delivery.¹⁴⁵ However, despite certain parallels, it cannot be established how close the relationship between the Auctor and Antonius might have been, whether the Auctor was directly involved in developing Antonius' theory (as a *secutus*) or used those works as a source.

¹³⁸ Cic. *Arch.* 19-20; Plut. *Mar.* 5. See e.g. Marx (1894) 147-50; Achard (1989) xxiii-v.

¹³⁹ Calboli (1965) 20 considers the *Rhetorica ad Herennium* to be their mouthpiece.

¹⁴⁰ Quint. *Inst.* 11.3.143; Suet. *Rhet.* 26.2.

¹⁴¹ Cic. *De or.* 1.21.94, 1.47.206, 1.48.208, *Brut* 163.

¹⁴² Quint. *Inst.* 3.3.9.

¹⁴³ Quint. *Inst.* 3.6.45.

¹⁴⁴ Calboli (1972) 129-34: *factum non factum* = *coniecturalis*; *ius iniuria* = *legitima*; *bonum malum* = *iuridicialis* (*Rhet. Her.* 1.11.18-15.25). Although see Cic. *De or.* 2.26.113 for Antonius' proposal of a different division. The unreliability of using *De Oratore* in this regard is discussed by Calboli (1972) 135; Achard (1994) 19.

¹⁴⁵ Calboli (1972).

It is also not possible to conclude definitively whether Antonius and the common Latin source for the *De Inventione* and the *Rhetorica ad Herennium* are one and the same, or whether the Auctor's reference to his own *doctor* is a sign that he is departing from the main Latin source at this point. Despite this remaining uncertainty, the apparent relationship between those who took up Antonius' theory and the Auctor (whether they were contemporaneous or not) serves to place the Auctor within a wider group of people who worked on Latin rhetoric. The lack of a proven connection between the Auctor and Plotius Gallus does not rule out that separately they were both part of a broader movement promoting the use of Latin in rhetorical education. If they were not connected then their independent actions (and those of Cicero) demonstrate all the more strongly how logical some form of Latin rhetorical instruction was as a response to the perceived contemporary situation.

Importance of the text

The results of the discussions above are somewhat negative and discouraging. It seems that there is little further to say regarding these inquiries besides offering an increasing number of plausible or implausible scenarios that cannot be proven.

Despite this, the importance of working with this text should be obvious by its very survival. Although at some point it became associated with Cicero's works, this alone could not guarantee its preservation. Prior to this the *Rhetorica ad Herennium* must have already been considered a significant work that was used and passed on by generations. As with Cato the Elder's *De Agricultura*, the only work of his to survive (virtually) complete, the practical and technical nature of the text may have worked in its favour among ancient audiences.¹⁴⁶

Indeed, although the historical context I will focus on here is the Auctor's own contemporary context, the text had a long and influential afterlife through the medieval

¹⁴⁶ See Gratwick (1982a) for a discussion of early Latin prose, esp. 142-4 for technical writing.

period and into the Renaissance as the *Rhetorica secunda* or *Rhetorica nova* of Cicero.¹⁴⁷ In particular, the text enjoyed a revival in the twelfth century, after which point there is a great deal of evidence for interaction with the text alongside the *De Inventione* including commentaries, glosses and lecture series.¹⁴⁸ Book 4 of the *Rhetorica ad Herennium* about Style (*elocutio*) was especially studied, as it spoke to a growing interest in the use of figurative language.¹⁴⁹ It was known across Europe and was particularly popular in Italy, where it sparked a new interest in ‘vernacular Ciceronianism’ in the thirteenth century.¹⁵⁰ It remained a key didactic text in the fourteenth and fifteenth centuries, and medieval commentaries on the two texts continued to be copied and used.¹⁵¹

When printing became possible from the late fifteenth century onwards there was a ‘proliferation’ of commentaries on the *Rhetorica ad Herennium* and *De Inventione*.¹⁵² The University of Glasgow library alone has four incunabula of the *Rhetorica ad Herennium* from this early period, which were printed in Cologne, Venice and Paris.¹⁵³ In two of these editions, the text is bound together with the *De Inventione*. Most interestingly, all editions have annotations in them (marginal and interlinear) that show direct engagement with the text. In some cases, these annotations are in different hands, or have been deliberately washed out, indicating the on-going use of the text over time.¹⁵⁴

This alone is an encouragement to look more closely at the text. And in fact, the inability to know the identity of the author, the exact dating of the two texts, their relationship or

¹⁴⁷ Copeland and Sluiter (2009) give a particularly relevant overview of the period 300-1475 CE. The *Rhetorica ad Herennium*’s influence is discussed throughout, but see esp. 28, 65-70, 370-3, 547, 692-5, 818-20 for introductory material and further references, and the long list of references in the index. See Ward (1983) for the Renaissance period. Murphy’s collected essays (Murphy [2005]) bring together many useful discussions, see esp. 1-26, 77-87 (= Murphy and Winterbottom [1999]). NB. As the *Rhetorica ad Herennium* was considered to be a work of Cicero until the late fifteenth century, it falls under the phrase ‘Ciceronian rhetoric’, which is commonly found in these studies.

¹⁴⁸ Copeland and Sluiter (2009) 370-1.

¹⁴⁹ Murphy (1974) 19-21 and *passim*, with Appendix; Copeland and Sluiter (2009) 372-3. Although see Camargo (2010) for the influence of Delivery (from Book 3).

¹⁵⁰ Copeland and Sluiter (2009) 68-9, 694-5, 818. See also Faulhaber (1972) on medieval Spain.

¹⁵¹ Ward (1983) 128-46.

¹⁵² Ward (1983) 138. Ward also discusses the less formal surviving writing on the *Rhetorica ad Herennium*, such as student notes and compositions: (1983) 163-7.

¹⁵³ Sp Coll Hunterian Bg.2.29 (Cologne: Johann Koelhoff, the Elder, ca. 1471-1472); Sp Coll Hunterian Be.3.29 (Venice?: Printer of Datus, ‘Elegantiolae’ [H 5969*], ca. 1475); Sp Coll Hunterian Bx.2.16 (Venice: Thomas de Blavis, de Alexandria, 1476); Sp Coll Hunterian Bw.3.16 (Paris: Au Soufflet Vert [Louis Symonel et Socii], 29 Dec. 1478). With thanks to Special Collections at the University of Glasgow for enabling access to these texts.

¹⁵⁴ Detailed information about each of the four incunabula, including selected high quality images of the editions, can be found via the Glasgow Incunabula Project website: www.gla.ac.uk/services/incunabula/.

source is not as limiting as it may seem. There is much to be said about the *Rhetorica ad Herennium* and its relationship to Roman politics and society in the early first century BCE.

In this thesis, then, I aim to rehabilitate the *Rhetorica ad Herennium* by recontextualising it. For the first time, this study will prioritise the *Rhetorica ad Herennium* and examine it as a text worthy of study in its own right. The Auctor's work is not a less erudite version of Cicero's *De Inventione*, nor is it only valuable in comparisons between the two handbooks. Instead, the *Rhetorica ad Herennium* is the work of skilled practitioner with its own merits.

By recognising this and looking at the *Rhetorica ad Herennium* in context, it is possible to enhance the understanding of the early first century BCE, a period for which there is little other evidence. In fact, I argue that the *Rhetorica ad Herennium* can significantly add to the picture of the Roman world in many ways.

Outline

In the first two chapters I provide the necessary background for understanding the *Rhetorica ad Herennium*. In Chapter 1, I outline the context of the *Rhetorica ad Herennium*, focusing on four key themes: history, the Italian question, law, and oratory. These four themes will recur throughout the thesis. In Chapter 2, I examine the *Rhetorica ad Herennium* as a rhetorical handbook. By looking at the way in which the author treats the five functions of an orator, I show that the text is carefully thought out. This acknowledgement of the text's fundamental purpose and value provides a basis for analysis in the remainder of the thesis.

In Chapter 3, I take up the first two themes mentioned above: the Auctor's treatment of history through the examples he uses and his focus on the Italians and Social War. The use of examples itself can be related to trends in historiography, and a study of the examples the Auctor uses shows that they are closely embedded in recent history. This supports the

idea that the examples are consciously chosen to resonate with on-going public debate, in contrast to the antiquating examples of Cicero's *De Inventione*. The different approach of the two authors suggests that they have different aims and audiences. It also highlights the possibility of alternative histories circulating in Rome.

In Chapter 4, I continue to study the Auctor's examples in detail from a political perspective. I question whether the content and style of the examples are sufficient evidence to label the Auctor as a *popularis*, taking into account the on-going difficulty of defining the term satisfactorily. I then examine the Auctor's example of *licentia*, (Frankness of Speech) and the invective that is frequently found in his examples in order to ask whether this can be associated with any particular group or known style of oratory.

In Chapters 5 and 6 I move on to talk about law. Forensic oratory may be the major focus of the Auctor's text but the law itself does not feature so prominently, and this raises questions about the way forensic oratory worked. In Chapter 5, I examine criminal law in the *Rhetorica ad Herennium* firstly through a series of examples that address the *iudices* (men of the jury) in a criminal trial or *quaestio*, and secondly by looking at the issue of *maiestas*, a relatively new charge that recurs several times in the text. *Maiestas* is discussed at length in Cicero's *De Oratore* and I compare the two texts to better understand the Auctor's approach.

In Chapter 6, the second chapter about Roman law, I turn to civil law and the knowledge shown by the Auctor on this subject. The Auctor's assumptions about his audience's knowledge of civil law suggest that they may have already known about this from personal experience or prior education. Equally, it may have been that they did not need to know such information in great detail. In either case, legal experts called jurists, who only advised on civil law, could fill this gap. The Auctor does not mention jurists in the *Rhetorica ad Herennium*, although Cicero does in the *De Inventione*,¹⁵⁵ but I argue that the system he implicitly describes requires their presence and co-operation. The relationship between jurists and orators is explored in more detail and I also consider their influence on the style of speaking in criminal versus civil law.

¹⁵⁵ Cic. *Inv. rhet.* 2.22.68.

In Chapter 7, I consider how the Auctor intended the text to be used. Taking into account the conclusions of the previous chapters, I discuss who might have benefitted from the text and what stage of education they may have been at. Beyond its primary addressee, Herennius, such a textbook does not have to be restricted to use in schools. In fact, Herennius' own slightly unusual situation suggests that there may have been others like him who were approaching rhetoric at a later stage and from a different angle. The Auctor's focus on practice and practicality, in comparison with Cicero's Greek-orientated, philosophical, and incomplete text, implies an audience who required straightforward and relatable instruction in Latin.

These considerations about purpose and audience add to the number of significant differences between the *Rhetorica ad Herennium* and the *De Inventione*, which I will draw together and emphasise in the Conclusion. Auctor has a distinctive focus on recent historical events, a different approach to criminal and civil law, and a unique way of representing the styles of oratory present in the text. The *Rhetorica ad Herennium* is a very different text, which, while speaking for continuity in some sense, also suggests a profound social transformation.¹⁵⁶

¹⁵⁶ Note on translations and editions: all translations are my own unless otherwise indicated; they are for illustrative purposes and make no claim to literary merit. I have used Achard's Latin texts for the *Rhetorica ad Herennium* (Achard [1989]) and the *De Inventione* (Achard [1994]), except in a very few noted occasions. For all other texts I have referred to the most recent OCT editions.

Chapter 1: Contextualising pre-Sullan Rome

The Auctor is writing in a period that is, in many ways, not well documented: E. Gruen described the decade of the 90s BCE as ‘ignored by default’.¹ It is true that some previous decades are better known than others, with the help of accounts such as Sallust’s *Jugurthine War* covering much of the 100s BCE, but according to the Epitome of Livy the later author devoted only one book to the years 98-91 BCE (Livy *Per.* 70). Nevertheless, other evidence shows that these were not quiet years. The *Fragments of the Republican Roman Orators* database documents over 90 orators between the 110s and the 80s BCE; the *Trials of the Roman Republic* lists a similar number of trials for the same period. In this chapter I will use this evidence to think about the context that shaped the oratory that the Auctor heard and his own response in the *Rhetorica ad Herennium*.

The chapter will be divided into four major strands. In the first section I will discuss the Auctor’s presentation of history in the *Rhetorica ad Herennium* and what historical topics he does not include. Following the success of Carthage’s conquest, the Auctor focuses largely on the succession of tribunes from the Gracchi to Publius Sulpicius. A sense of military and civic weakness pervades the text alongside an interest in the Italians and the Social War. Yet there is no mention of any other foreign battles or the generalship of Sulla, with only a brief reference to Marius. Several legal trials are quoted but not explicitly attested, while others that seem significant in Cicero’s works do not appear.

In the second section I will look at who the leading orators were in this period and the examples that the Auctor and his audience might be following. At the beginning of his fourth book, the Auctor gives a chronological list of people who might provide rhetorical examples. I will take this list, and the other orators who appear in the *Rhetorica ad Herennium*, as a starting point to compare with the other evidence. In particular, it will be important to consider who might be influential after the deaths of the last two orators in this list, Crassus (in 91 BCE) and Antonius (in 87 BCE) shortly before the *Rhetorica ad Herennium* was composed.

¹ Gruen (1966a) 32. Gruen’s own work, of course, goes some way to correcting this.

In the third section I will analyse the relationships between the Romans and the Italians from the Gracchan period onwards. Tiberius Gracchus introduced legislation that created an agrarian commission: despite his murder, the commission was active and his policies were implemented over the following decades. Gaius Gracchus furthered this legislation before his assassination as did another tribune, Sextus Thorius, in the 110s BCE.

Legislation of the 90s BCE exemplifies the ongoing tension between Roman citizens and the Italians. It is thought that the attempts of Marcus Livius Drusus to introduce another agrarian law in 91 BCE (amongst other legislation) sparked the Social War that was to have such terrible and lasting consequences in Rome and throughout Italy. The Auctor's interest in what he terms the 'Italian' War and the Italian cities is noticeable, and the legacy of this conflict would have been difficult to ignore in Rome during the 80s BCE.

Finally, and in connection with this, I will look at the legal changes that have a bearing on the context of the *Rhetorica ad Herennium*. Apart from annual changes to civil law due to the Praetor's Edict, it seems as though there were additions to the *quaestio* system too, expanding the number of opportunities for criminal trials and thereby increasing the burden on juries. The staffing of the juries was a regular source of tension and had recently changed when the *Rhetorica ad Herennium* was written, owing to the *lex Plautia* of 89 BCE. Most importantly, perhaps, for the legal system was the changing status of the Italians. After the agrarian legislation of Tiberius Gracchus, the legal system must have had to deal with claims and counter-claims over land, although there is little direct evidence for this. For the Italians, redress was difficult as they could not directly bring a case to court in Rome without an intermediary. The distribution of citizenship to the Italian allies after the Social War will have changed this, giving a large new group of citizens access to Rome's legal system.

By studying these four strands of Rome's recent history, I hope to begin to show that the context of the *Rhetorica ad Herennium* is far from being relegated to the background, but must be considered to fully understand the text. These four strands raise important themes that will recur throughout the thesis.

History according to the *Rhetorica ad Herennium*

The *Rhetorica ad Herennium* does not claim to be a historical text, but historical events are mentioned throughout the work. At one point the voice of Lucius Brutus is invoked, founder of the Republic and consul in 509 BCE,² and the *terminus post quem* for the work is a reference to Marius' seventh consulship in 86 BCE.³ Between these two points the Auctor is, of course, highly selective and in this section I will show where the emphasis of the *Rhetorica ad Herennium* lies and what has been overlooked.

Several references to Rome's successful conquest of Carthage suggest that the events of the middle of the second century were seen as a kind of glorious past.⁴ The statements praising Scipio Aemilianus and Laelius (for example, 'The foresight of Scipio crushed the power of Carthage')⁵ give few details about the two men and their actions, and little can be learned about what happened beyond these generic descriptions.⁶

The time of the Gracchi is the next significant moment in the *Rhetorica ad Herennium* and there are several references to the two brothers in the text. Tiberius Gracchus' death in 133 BCE is described in great detail at the end of the *Rhetorica ad Herennium*.⁷

As soon as Gracchus saw that the people were faltering, scared that he might be swayed by the senate's authority and change his mind, he ordered a *contio* to be summoned.

Although there is no mention here of the specific policies that made Tiberius Gracchus so unpopular with other senators,⁸ his use of oratory and the need to appeal to the people is made clear.⁹ In another reference shortly before this, the (over)reliance of the Gracchi on

² *Rhet. Her.* 4.53.66.

³ *Rhet. Her.* 4.54.68.

⁴ *Rhet. Her.* 3.2.2; 3.5.8; 4.13.19; 4.14.20; 4.27.37; 4.53.66.

⁵ *Rhet. Her.* 4.32.43.

⁶ *Rhet. Her.* 4.13.19 (x2); 4.32.43.

⁷ *Rhet. Her.* 4.55.68: *quod simul atque Gracchus prospexit fluctuare populum, verentem ne ipse auctoritate senatus commotus sententia desisteret, iubet advocari contionem*. I discuss the significance of this example and its positioning in Chapter 3.

⁸ For useful accounts, see: Gruen (1968b) 45-78; Stockton (1979) 40-60; Lintott (1994) 62-77.

⁹ See Flower (2013).

the ‘throne of people’ (*populi frequentia*) is given as a warning to the later tribune Saturninus.¹⁰

The continuing disturbance caused by Gaius Gracchus in the 120s BCE is implied in another example: ‘Riots, Gaius Gracchus, you are planning civil and internal riots!’,¹¹ and there are further hints of the wider situation regarding land disputes in particular in three references to the Italian town of Fregellae.¹² A summary of the situation is found in one such reference, which bemoans Fregellae’s crime:¹³

Treachorous Fregellae, how easily you have wasted away because of your crime, so that now hardly any foundations remain of that town whose brightness recently illuminated Italy.

Fregellae’s ‘crime’ was to revolt against Rome in 125 BCE, after (it seems) the failure of the consul Fulvius Flaccus’ attempt to grant citizenship to the allies.¹⁴ Gaius Gracchus was elected to the tribuneship with Flaccus’ support and was accused of involvement in the Fregellae rebellion.¹⁵ Although he denied this, he continued to advocate citizenship for the Latin allies.¹⁶ In these references to Fregellae, then, there is an implicit awareness of the political manoeuvrings of Gaius Gracchus and the issues current in Rome in those years.¹⁷

Besides this, there are several other events in the *Rhetorica ad Herennium* that can be dated to the final decades of the second century BCE. Four trials given as examples of opposing judgements can be dated by the mention of the presiding praetor to between c.136-103 BCE, but the disputes (about inheritance and *iniuria*) do not seem to be of wider historical importance, despite their interest.¹⁸ One trial of this period that does receive treatment elsewhere, enabling the identification of the example and its author, is the

¹⁰ *Rhet. Her.* 4.54.67.

¹¹ *Rhet. Her.* 4.28.38: *Tumultus, Gai Gracce, tumultus domesticos et intestinos comparas!* NB. I agree with Caplan’s reading of *comparas* here (after the vocative) as opposed to Achard who has *comparat*. See also the discussion in Martin (2000) 29.

¹² *Rhet. Her.* 4.9.13, 4.15.22, 4.27.37.

¹³ *Rhet. Her.* 4.15.22: *Perfidiosae Fregellae, quam facile scelere vestro contabuitis, ut cuius nitor urbis Italiam nuper inlustravit, eius nunc vix fundamentorum reliquiae maneat.*

¹⁴ Val. Max. 9.5.1; App. *B Civ.* 1.21, 34. Gabba (1994) 105; Lintott (1994) 76; Mouritsen (1998) 118-9.

¹⁵ App. *B Civ.* 1.21; Plut. *C Gracch.* 3.1.

¹⁶ App. *B Civ.* 1.23.

¹⁷ I discuss the specifically Italian dimension of these references below.

¹⁸ *Rhet. Her.* 2.13.19, cf. 1.14.24.

defence of the Vestal Virgin Licinia by Licinius Crassus in 113 BCE.¹⁹ This speech, spoken in the retrial of three Vestal Virgins accused of unchastity, was given before the notoriously strict judge Lucius Cassius Longinus Ravilla (*cos.* 127 BCE). In the example used by the Auctor, Crassus rebukes the judge for allowing a witness to overstep their role, defining in the process the roles of each member of the court.²⁰

The military exploits of the Jugurthine War (112-106 BCE) are not mentioned in the *Rhetorica ad Herennium*. As Sallust tries to show in his history, this war was another turning point in relations between the more conservative and popular members of the senate.²¹ The trials of the Mamilian commission of 109 BCE are not mentioned either, despite the high rank of those convicted by this *quaestio extraordinaria* for supposedly betraying Rome through deals with Jugurtha.²² The war with Jugurtha was also the cause of Marius' rise to power,²³ but the brief description of Marius' career that appears in the *Rhetorica ad Herennium* begins after his consulships at the end of the second century.²⁴ The synopsis does not mention Marius' military victories or the changes he made to the composition of the Roman army, focusing more on his political career and civic status.²⁵ Nevertheless, by calling Marius the 'first man of the state' (*primus...civitatis*) in the early 90s BCE, the Auctor provides a hint that Marius' fall from grace may not have been as sudden as others have suggested.²⁶

By contrast, two serious military defeats in the same period do receive attention from the Auctor of the *Rhetorica ad Herennium*. After the defeat and death of the consul Lucius Cassius Longinus in 107 BCE, the legate Gaius Popillius Laenas made a humiliating pact with the Gauls to allow his army to escape leaving their equipment behind.²⁷ His trial appears twice in the *Rhetorica ad Herennium*;²⁸ the second example is given in Popillius'

¹⁹ Cic. *Brut.* 160.

²⁰ *Rhet. Her.* 4.35.47. Caplan attributes this example to Crassus but he is not named here, so this speech may have been spoken by another participant in the trials. See now Guérin (2015) for a further analysis of this example.

²¹ Sall. *Iug.* 5.1-2.

²² Sall. *Iug.* 40; see *TLRR* 52-7. Gruen (1968b) 136-56.

²³ E.g. Plut. *Mar.* 7. For more on Marius see Carney (1960), (1961a), (1961b), (1962); Bicknell (1969); Paul (1984); Evans (1994); Lintott (1994) 86-103.

²⁴ *Rhet. Her.* 4.54.68. I quote the example in Chapter 3.

²⁵ Sall. *Iug.* 86.2; Plut. *Mar.* 9.1.

²⁶ E.g. Gruen (1968b) 190.

²⁷ Caes *B Gall.* 1.7.4, 1.12.5-7; Livy *Per.* 65. Lintott (1994) 93.

²⁸ *Rhet. Her.* 1.15.25, 4.24.34.

own voice. The charge, which the Auctor gives as *maiestas*, may be the reason for the Auctor's interest in the case despite the probability that the trial was actually held under *perduellio* (as Cicero says in *De Legibus* 3.36) prior to the *lex Appuleia de maiestate* of 103/1 BCE.²⁹ The Auctor's references to Quintus Servilius Caepio the Elder's defeat at Arausio in 105 BCE may also be motivated by the legal consequences, again connected to the charge of *maiestas*.³⁰ After the defeat at Arausio, Caepio the Elder was tried and convicted by the tribune Norbanus in 103 BCE,³¹ beginning the dispute that led to the trials of his son Quintus Servilius Caepio the Younger and Gaius Norbanus for *maiestas* in the 90s BCE.³²

Caepio the Younger appears in the *Rhetorica ad Herennium* in connection with another tribune, Lucius Appuleius Saturninus. The Auctor describes how Caepio the Younger, when quaestor, obstructed Saturninus' attempt to pass a grain law despite a veto of the senate against such an attempt.³³ Saturninus later succeeded in passing the grain law as well as the law that created the permanent *quaestio de maiestate*. Saturninus' death is mentioned in the context of other murdered tribunes from these decades but the Auctor does not allude to the role of Marius in allowing his former supporter to be killed.³⁴

Several years after the disruptions of Saturninus' tribuneships (although the Auctor does not mention the gap), Caepio is tried for *maiestas* because of his actions and the Auctor gives definitions of *maiestas* that represent both sides of the case.³⁵ Although Caepio's trial is mentioned repeatedly, the Auctor does not mention the trial of Norbanus that took place in retaliation.³⁶ Two other trials from the late 90s BCE that appear to be important in Cicero's work are also not mentioned in the *Rhetorica ad Herennium* (or at least, not in a

²⁹ See *TLRR* 59 with further references.

³⁰ *Rhet. Her.* 1.14.24. Lintott (1994) 93.

³¹ See *TLRR* 66. *Cic. Balb.* 28, *Brut.* 135; *Per.* 67; *Strab.* 4.1.13; *Val. Max.* 4.7.3, 6.9.13.

³² I discuss these trials and *maiestas* in Chapter 5. For Norbanus, see Münzer (1932); Badian (1957); Gruen (1966b); Badian (1983).

³³ *Rhet. Her.* 1.12.21, cf. 2.12.17. For Saturninus, see Gruen (1965b); Badian (1984); Lintott (1994) 95-103.

³⁴ *Rhet. Her.* 4.22.31. Marius' role: *Cic. Rab. perd.* 20, *Cat.* 1.4, *Brut.* 224, *Phil.* 8.15; *Livy Per.* 69.4; *Val. Max.* 3.2.18; *Plut. Mar.* 30; *App. B Civ.* 1.32.

³⁵ *Rhet. Her.* 2.12.17.

³⁶ *Cic. De or.* 2.47.197-49.201. Badian (1957); Gruen (1966a) 43-7.

way that can now be identified): the *causa Curiana* trial about inheritance and the trial of Publius Rutilius Rufus.³⁷

The end of the 90s BCE saw the culmination of increasing tensions between Rome and the Italian allies, which I will discuss in more detail below. The immediate trigger for the war is said to have been the failed legislation of the tribune of 91 BCE, Livius Drusus.³⁸ Although Drusus is normally seen only in the context of his conservative supporters,³⁹ the Auctor includes him in his list of tragically murdered tribunes, alongside Tiberius and Gaius Gracchus, Lucius Saturninus and Publius Sulpicius.⁴⁰

The resulting Social War (91-88 BCE) is called the *Bellum Italicum* by the Auctor and in Book 3 he includes the deliberative question, whether the senate should grant citizenship to the allies or not.⁴¹ Two Italian towns known for their loyalty to Rome during the war, Alba Fucens and Pinna, are also praised.⁴² The Auctor does not include further details of the military engagements between Rome and the allies during the war, nor the eventual success of the Roman troops.⁴³ However, two examples used in the *Rhetorica ad Herennium* have been connected with the *lex Varia* (and its author, Gaius Varius),⁴⁴ which established a *quaestio* to prosecute those who were accused of inciting the allies to rebel.⁴⁵

In the aftermath of the Social War, the tribune Publius Sulpicius campaigned with Marius in 88 BCE for a fairer redistribution of the new Italian citizens within the voting tribes.⁴⁶ After passing the laws by force, Sulpicius and Marius were forced to flee from Rome by

³⁷ The *causa Curiana* appears in Cicero's *De Inventione* (2.62-4), as I discuss in Chapter 6 with further references. For the trial of Publius Rutilius Rufus: Balsdon (1937); Badian (1956); Gruen (1966a) 52-5; Marshall (1976); Bauman (1983) 352-70; Kallet-Marx (1989), (1990).

³⁸ Lintott (1994) 111-4. Mouritsen (1998) 129 questions the link between Drusus and the outbreak of the war.

³⁹ Mouritsen (1998) 115 for a discussion of the sources: Cic. *Mil.* 16, *Clu.* 153, *Dom.* 50, *De or.* 1.24; Ps.-Sall. 6.3; Diod. Sic. 37.10.1; Livy *Per.* 70. For an analysis of the fluidity of tribunician politics, see Russell (2013).

⁴⁰ *Rhet. Her.* 4.22.31.

⁴¹ *Rhet. Her.* 3.2.2.

⁴² *Rhet. Her.* 2.28.45.

⁴³ E.g. Diod. Sic. 37.2.10; Livy *Per.* 76; App. *B Civ.* 1.53. Gabba (1994); Mouritsen (1998).

⁴⁴ *Rhet. Her.* 4.9.13; 4.15.22.

⁴⁵ Gruen (1965a); Badian (1969); Gabba (1994) 114-5; Mouritsen (1998) 132-7. See Rawson (1979) for a discussion of Sisenna, whose account of the Social War and the Varian trials was considered definitive by contemporaries. For fragments of Sisenna's history, see now *FRHist* 26.

⁴⁶ Livy *Per.* 77; Asc. *Corn.* 64C; Plut. *Sull.* 8.1-2; App. *B Civ.* 1.55. Lintott (1971); Powell (1990); Seager (1994) 167-73.

Sulla who opposed their measures and had the support of an army fresh from fighting with him in the Social War.⁴⁷ Sulpicius was captured and killed. The Auctor hypothesises about the trial of Sulpicius' killer,⁴⁸ and Caplan suggests that several examples derive from a speech from his imagined trial.⁴⁹ Sulpicius is the last of the murdered tribunes listed in the Auctor's example that brings the five together,⁵⁰ and he is also one of the latest figures to be datable within the text. Marius' return in 87 BCE and consulship in 86 BCE,⁵¹ just weeks before his death, are the final events that can be identified in the *Rhetorica ad Herennium*.

Besides this, Sulla, Marius, and Marius' partner in his return, Cinna,⁵² do not receive any attention in the *Rhetorica ad Herennium*. The generals who are now regarded as major players in the Social War are barely mentioned (such as Sulla himself, Pompeius Strabo and his son, later Pompeius Magnus). Similarly the aftermath of the war, its struggles and disagreements, has little bearing on the text. The brutalities associated with the rioting and march on Rome in 88 BCE do not appear, or at least not explicitly.⁵³ It is true that many of the examples used in the *Rhetorica ad Herennium* cannot be securely attributed to a speaker or a particular moment, and the lack of detailed evidence for this period means that often they cannot be compared or corroborated. Yet it could be argued that many of the speakers quoted or invented within the text evoke an atmosphere of distress and danger at Rome. For example, one narrative describes four soldiers entering the house of a wealthy Roman and killing him.⁵⁴ Although it cannot be proven, it may be that these are indications of the situation in Rome when the Auctor was writing.

The picture the *Rhetorica ad Herennium* gives of recent Roman history is inevitably a selective one, and what can be identified of it now often depends on the availability of other evidence. Nevertheless, this survey of the Auctor's historical references shows that

⁴⁷ For Sulla's actions in this period see Frier (1971); Levick (1982); Keaveney (2005)² esp. 45-63; Flower (2010a), (2010b).

⁴⁸ *Rhet. Her.* 1.15.25.

⁴⁹ Caplan (1954) *ad loc.* 4.14.20, 24.33, 28.38, 34.45.

⁵⁰ *Rhet. Her.* 4.22.31. For an analysis of the development of Sulpicius' political position, see Powell (1990).

⁵¹ *Rhet. Her.* 4.54.68. Seager (1994) 175-9.

⁵² For Cinna, see Badian (1962); Bulst (1964); Kinsey (1987); Seager (1994) 183-7; Lovano (2002); Flower (2010b).

⁵³ Carney (1961); Katz (1975); Keaveney (2005)² 45-63. For other events of 88 BCE, see Katz (1976), (1977); Keaveney (1982).

⁵⁴ *Rhet. Her.* 4.52.65.

his rhetorical handbook touches on many of the events and characters that make up the surviving history of this period. In other cases, things that seem important through the lens of the Ciceronian evidence, such as the prosecution of Norbanus that dominates the *De Oratore*, do not appear and this raises the possibility of other viewpoints and priorities that are different to Cicero's dominating narrative.

Orators and Oratory

As a teacher of rhetoric, the Auctor was invested in the orators and oratory around him. Many of the examples he uses are, or purport to be, taken from speeches that he may have heard spoken in the Roman forum, or perhaps inspired by them. In this section I will review the famous speakers of the day and what their influence may have been on the Auctor's teaching. In particular, it will be useful to identify the leading orators in the period the *Rhetorica ad Herennium* was being written following the deaths of Crassus and Antonius.

The Auctor does give a fairly clear indication of orators he considers influential. He argues at the beginning of his fourth book that he will not use examples taken directly from others, but he gives a list of those from whom examples could be taken.⁵⁵ In chronological order of their death, the Auctor gives: Cato the Elder (*cos.* 195 BCE),⁵⁶ Tiberius Gracchus (*tr. pl.* 133 BCE), Gaius Gracchus (*tr. pl.* 123 BCE),⁵⁷ Gaius Laelius (*cos.* 140 BCE), Scipio Aemilianus (*cos.* 147, 134 BCE), Servius Sulpicius Galba (*cos.* 144 BCE), Marcus Aemilius Lepidus Porcina (*cos.* 137 BCE), Lucius Licinius Crassus (*cos.* 95 BCE), and Marcus Antonius (*cos.* 99 BCE).⁵⁸ These nine men span the century before the Auctor was writing and were important political actors in their time, as described above in several cases.

⁵⁵ *Rhet. Her.* 4.5.7.

⁵⁶ For Cato the Elder, see Astin (1978); Burnand (2000) 201-24; Sciarrino (2011).

⁵⁷ For the Gracchi, see Stockton (1979).

⁵⁸ For Crassus and Antonius, see Fantham (2004) 26-48.

The identification of these orators with speakers of examples in the *Rhetorica ad Herennium* is uncertain as the Auctor does not attribute many of his examples to their original authors, and many of the examples cannot be corroborated from other surviving fragments of speeches. Nevertheless there are some examples that can possibly be associated with these speakers, if only to say that there is a similarity in style. One example defending the accused against avarice or want might be derived from Marcus Antonius' defence of Manius Aquillius in 98 BCE.⁵⁹ It has also been noted that a harangue against the complacency of the *Quirites* is similar in sentiment to what Gaius Gracchus may have said against his opponent Marcus Livius Drusus.⁶⁰ In the same vein, Quintilian's comment that Cato the Elder said every adulteress was a poisoner suggests that a long example on the subject in the *Rhetorica ad Herennium* may derive at least its theme from that orator.⁶¹ In these cases, then, there is the possibility of a connection between those people the Auctor mentions as exemplary orators and the orators from whom he does actually take examples.

The most commonly identified orator among the speakers of the *Rhetorica ad Herennium* is Crassus. As well as including him in the list of exemplary orators, the Auctor quotes and names him as an example of an *exemplum* in the same section of his fourth book, using 'quibus possumus et debemus' from Crassus' speech in 106 BCE in support of Quintus Servilius Caepio's law to return juries to the senators.⁶² There is also the quote mentioned above directed at the judge Lucius Cassius Longinus Ravilla during Crassus' defence of the Vestal Virgin Licinia.⁶³ Other examples have also been connected with Crassus: two are similar in tone to surviving extracts of his speech in 91 BCE against Marcus Junius Brutus,⁶⁴ and there is another that may also be from his 106 BCE speech.⁶⁵

However, it is possible, or even probable, that the comparative frequency of Crassus' appearance in the *Rhetorica ad Herennium* is a consequence of the amount of Ciceronian evidence pertaining to Crassus. Cicero's interest in Crassus means that more is known

⁵⁹ Caplan (1954) *ad loc.* 4.38.50. Gruen (1968b) 194-5.

⁶⁰ Caplan (1954) *ad loc.* 4.37.49.

⁶¹ Caplan (1954) *ad loc.* 4.16.23, cf. Quint. *Inst.* 5.11.39.

⁶² *Rhet. Her.* 4.3.5. For more about the *lex Servilia*, see Gruen (1968b) 158-9; Lintott (1994) 93; Suarez Piñero (2000) 259.

⁶³ *Rhet. Her.* 4.35.47. Cic. *Brut.* 160.

⁶⁴ *Rhet. Her.* 4.53.67, 4.13.19. Cic. *Chu.* 140-1, *De or.* 2.220, 223-6. Gruen (1966a) 59-60.

⁶⁵ *Rhet. Her.* 4.22.30.

about Crassus' career, speeches, and style than many other orators and hence Crassus' work can be more easily identified. The attention Cicero pays to Crassus also means that he seems to be the leading orator of the time and this perhaps encourages the identification of examples with his work. Therefore Crassus' position in the *Rhetorica ad Herennium* should not be overstated. Nevertheless it is true that Crassus is named three times in the *Rhetorica ad Herennium* while other orators are named once or not at all and this suggests that the contemporary orator was important for the Auctor.

Crassus' influence on contemporary oratory was perhaps felt by the Auctor in other ways, too, as he was a key figure in the episode surrounding the *rhetoires Latini*. Knowledge of this group of *rhetoires Latini* comes in part from Suetonius, who records a decree issued against them in 92 BCE by the censors Crassus and Lucius Domitius Ahenobarbus. Cicero also discusses the subject in *De Oratore* (set in the following year), where he includes the information that Lucius Plotius Gallus opened the offending school (*ludus*) around 93 BCE (*hoc biennio*).⁶⁶ According to Suetonius, the censors considered it to be against 'the habit and custom of our ancestors' (*consuetudo ac mos maiorum*), stating in no uncertain terms 'we do not approve' (*nobis non placere*).⁶⁷

Whether this was the real reason for such official disapproval is not clear; it might be that Crassus and Ahenobarbus' opposition was not to the language of the rhetorical teaching *per se*.⁶⁸ Some scholars, for example Bonner,⁶⁹ supplement the edict that appears in Suetonius' work with the explanation that Cicero has Crassus give in the *De Oratore*. There Crassus says that his real motive was the fear that all students would learn was *impudentia*.⁷⁰ Bonner suggests that the oratorical style being taught in the Latin schools was unacceptable to purists like Crassus, who is nevertheless made to admit that a good Latin teacher, if one could be found, would actually be better than any Greek teacher.⁷¹

⁶⁶ Cic. *De or.* 3.24.93.

⁶⁷ Suet. *Rhet.* 25.2, cf. Cic. *De or.* 3.24.93-5. Kaster (1995).

⁶⁸ *Contra Pina Polo* (1996) 85.

⁶⁹ Bonner (1977) 72-4.

⁷⁰ Cic. *De or.* 3.24.93.

⁷¹ Cic. *De or.* 3.24.95. NB. Despite H. Rackham's translation, Cicero seems to be fairly favourable towards Greek teachers at 3.24.94: *nam apud Graecos, cuicumodi essent, videbam tamen esse praeter hanc exercitationem linguae doctrinam aliquam et humanitate dignam scientiam*. Kinsey (1981) argues that low standards were not the reason behind the edict, rather the debating of contemporary topics in public.

Alternatively, Marx and those following him have argued that the edict must have had an unstated political motive as a result of Plotius Gallus' supposed connection with Marius.⁷² This idea that Crassus was opposed to a 'popular' movement connected with Marius seems to have also been a contemporary one, as Crassus is made to deny it in *De Oratore*.⁷³ Crassus is explicitly made to say that his motive was not to prevent the young generation honing their talents as some said it was.⁷⁴

Corbeill takes a pragmatic view,⁷⁵ arguing that the Latin school threatened the establishment (represented by the censors) because it gave those who could not speak Greek and could not afford private tutors (realistically, members of the non-elite) the potential to gain recognition through public speech. On Corbeill's view, the people who ran such a school must have been independent and even radical thinkers.⁷⁶

The threat of change identified by Corbeill seems to be the most plausible explanation for the opposition to the school of the *rhetores Latini* as it relates to the language of teaching as well as a lowering of standards. This reflects most accurately the tone of the edict, Crassus in *De Oratore*, and the letter from Cicero to Marcus Titinius quoted by Suetonius, in which Cicero says that some very learned men advised him as a young man that Greek training would better nurture his talent.⁷⁷ This is a reminder that the influence of Greek orators and Greek methods remained strong.⁷⁸

Other external evidence can also be helpful to build an idea of other orators and styles. Cicero discusses many of the orators mentioned by the Auctor in his work the *Brutus* (46 BCE) in which he seeks to write a history of oratory up to his own time.⁷⁹ Indeed, writing forty years later Cicero often singles out these same men as the best orators of their age,

⁷² As discussed in the Introduction.

⁷³ I discuss the Auctor's connection to the *populares* further in Chapter 6.

⁷⁴ *Cic. De or.* 3.24.93.

⁷⁵ See also Pina Polo (1996) 85 who emphasises that the language, Latin, is the key point.

⁷⁶ Corbeill (2001) 272-3. Cf. Bloomer (2011) 51.

⁷⁷ Suet. *Rhet.* 26.1.

⁷⁸ As recognised by e.g. Crawford (1978) esp. 201-2 in the context of history and Griffin (1997) for philosophy and rhetoric.

⁷⁹ Cato (*Brut.* 60, 63-9); Tiberius Gracchus (*Brut.* 103-4); Gaius Gracchus (*Brut.* 125-6); Laelius (*Brut.* 82-9); Scipio (*Brut.* 82-5); Galba (*Brut.* 86-94); Porcina (*Brut.* 95); Crassus (*Brut.* 138-65); Antonius (*Brut.* 138-42). For more about the function of Cicero's *Brutus* see Steel (2002-03); Aubert-Baillet and Guérin (2014).

showing that the Auctor was not alone in his estimation of their talent nor, perhaps, in recalling their style of speech. Cicero's information reflects the lasting reputations of these orators and indicates what they were famous for: they were highly trained but able to innovate, embellish, digress and amuse without losing sight of their argument. Cicero presents them as well-rounded individuals fulfilling the functions of an orator.

Cicero's *Brutus* also includes a range of other contemporary figures besides Crassus and Antonius, the final two orators on the Auctor's list. The most important seem to be Lucius Philippus, of the older generation, and the younger group Quintus Varius, Gnaeus Pomponius, Gaius Curio, Lucius Fufius, Marcus Livius Drusus and Publius Antistius.⁸⁰ There are examples in the *Rhetorica ad Herennium* which have been associated with Varius and the *lex Varia*, as discussed above,⁸¹ and Livius Drusus is also commemorated, but the other figures who are prominent in Cicero's later recasting of the period are not immediately visible.

An alternative group of contemporary orators is offered in Cicero's *De Oratore*, set in 91 BCE only a few years before the *Rhetorica ad Herennium* was written. Although Crassus and Antonius are the main characters, there are also two members of the younger generation, Publius Sulpicius Rufus and Gaius Aurelius Cotta. As discussed above, Sulpicius also appears in the *Rhetorica ad Herennium* as part of the tradition of radical tribunes descended from the Gracchi, but his role as an orator prior to that is not discussed.⁸² Cotta, on the other hand, cannot be identified in the *Rhetorica ad Herennium*. This is also true of the remaining characters in *De Oratore*: Quintus Mucius Scaevola (the Augur), a leading jurist; Quintus Lutatius Catulus; and Gaius Julius Caesar Strabo Vopiscus, who leads the long section on humour in oratory.⁸³ Of these, only Cotta remained alive when the Auctor was writing.⁸⁴

⁸⁰ Cic. *Brut.* 173, 182.

⁸¹ *Rhet. Her.* 4.9.13, 4.15.22.

⁸² For more on Sulpicius in this period, see Lintott (1971); Powell (1990). Powell argues strongly that there is no evidence that Sulpicius underwent a change of allegiance in 88 BCE.

⁸³ Cic. *De or.* 2.217-289.

⁸⁴ Cic. *Brut.* 311.

Cicero returns to this period again in the *Brutus*, in the biographical section at the end of the work. He mentions several of the same orators as well as others when discussing Cinna's rule in the 80s BCE.⁸⁵

For around three years there was no warring in the city, but either by the death, withdrawal or flight of the orators (for even the young men, M. Crassus and the two Lentuli, had left) Hortensius was the most prominent in the courts. Antistius gained more and more approval each day and Piso also spoke often, while Pomponius spoke less often, Carbo rarely and Philippus only now and again... Meanwhile there were riots to recover the *res publica* and the cruel death of three orators: Scaevola, Carbo and Antistius. There was the return of Cotta, Curio, Crassus, the Lentuli, and Pompeius and the restoration of laws and courts, the recovery of the *res publica*. However, from the cast of orators Pomponius, Censorinus and Murena were taken.

As Cicero records, Antistius and Pomponius were killed along with Quintus Mucius Scaevola (the Pontifex),⁸⁶ another significant figure who had remained in Rome despite an earlier attempt on his life at Marius' funeral in 86 BCE.⁸⁷ But it is Hortensius who is said to have been the 'most prominent in the courts' (*primas in causis*), courts which were functioning despite the lack of orators.⁸⁸

Hortensius is a figure often associated with the later period of Cicero's career, but he began his own career in the middle of the 90s BCE, over a decade before Cicero. As recorded in the *De Oratore*, Hortensius' first known speech was given in 95 BCE when he was nineteen, and Cicero says that even then he was recognised as a good orator.⁸⁹ Although there is not a great deal of information about his work in this period, Cicero says that Hortensius was involved in major cases from his early career.⁹⁰ Cicero praises his memory, his method of arranging his arguments, and his voice with only a hint of criticism regarding his delivery.⁹¹ From Cicero's perspective, then, Hortensius was the most important orator after the death of Crassus and Antonius, bridging the gap between their deaths and the career of Cicero himself. By staying in Rome, Hortensius was able to maintain a high profile and, despite this potentially risky strategy, he survived the turbulence of the 80s BCE unscathed. At the same time, at least according to Cicero,

⁸⁵ Cic. *Brut.* 308-11. For further discussion of this passage, see Lovano (2002) 63-8.

⁸⁶ Bauman (1983) 340-423.

⁸⁷ Cic. *Rosc. Am.* 33; Val. Max. 9.11.2.

⁸⁸ Kinsey (1987), *contra* Gruen (1968b) 229-47.

⁸⁹ Cic. *De or.* 3.61.229 (Crassus: *cum me consule in senatu causam defenderit Africae*), *Brut.* 228. Gruen (1966a) 49, (1968) 243-4; Steel (2002-03) 208-9.

⁹⁰ Cic. *Brut.* 301.

⁹¹ Cic. *Brut.* 301-3.

Hortensius brought further innovations to oratory. This combination means that he may well have been an influence on the Auctor's writing and it is possible that his prodigious memory and notable delivery had an impact on the Auctor's own innovations in these areas.⁹²

Three important figures have, again, hardly been mentioned: Marius, Cinna and Sulla. This is because they do not appear in the *Rhetorica ad Herennium* (apart from the brief recounting of Marius' career) or in Cicero's *Brutus*.⁹³ Much of the evidence for Marius speaking comes from Sallust's fictionalised speeches in the *Jugurthine War*, although his involvement in several law suits in the 90s BCE (often with Antonius) is recorded, confirming that he was still being heard in public.⁹⁴ There is very little evidence of Sulla or Cinna's oratorical ability, especially prior to Sulla's dictatorship.⁹⁵ It is difficult to know whether this silence, particularly regarding Sulla and Cinna, is a consequence of the turbulence of their periods in power and the fear that surrounded them, or whether it is an indication that they were not outstanding orators from the Auctor's perspective.

This brief survey shows that there are many orators who may have influenced the Auctor in his teaching and writing. His list of orators in Book 4 stretches back through several generations but the final two orators, Crassus and Antonius, are the most familiar to a modern reader due to the attention Cicero pays them. It also seems that Crassus is the most present in the Auctor's mind as he is named most frequently as well as there being several examples that may derive from his speeches throughout the text. It must also be true that the Auctor knew of many other orators who he does not mention, and these may include the men that Cicero discusses as well as others. Additionally, when thinking about the Auctor writing in the mid-80s BCE it is important to remember that only a limited number of orators remained in Rome after many had been killed or exiled. Nevertheless the Auctor's whole project and his use of a wide range of sources might suggest that he did not expect this situation to continue.

⁹² I discuss Memory and Delivery in Chapter 2.

⁹³ See Steel (2002-03) 205-7.

⁹⁴ Cic. *Balb.* 49, *De or.* 2.194-9; Val. Max. 8.2.3; Plut. *Mar.* 38.3-5.

⁹⁵ For Sulla in the 90s BCE, see Badian (1959); Cagniat (1991); Reams (1993); Keaveney (2005)² 28-43.

Italian questions

The Auctor refers to the Social War and the Italian allies several times in the course of the *Rhetorica ad Herennium*, and the question of Italian citizenship is expressed clearly in an example of a deliberative question:⁹⁶

Just as if the senate were to debate during the Social War whether to give citizenship to the allies or not.

This interest is not surprising considering the political debates that must have been occurring at the time the Auctor was writing,⁹⁷ as well as the developments in the preceding decades from the agrarian legislation of Tiberius Gracchus onwards. The Auctor may also have considered these questions to be particularly important because of his own background or that of his audience. In this section I will outline the developments and debates relating to the Italian allies and suggest how they may have affected the Auctor's work.⁹⁸

For the purposes of this discussion, Tiberius Gracchus is a good starting point. As discussed above, the Gracchi are among the earliest figures to be dwelt on by the Auctor; their politics (and fate) was clearly still under discussion when the Auctor was writing. Tiberius Gracchus, as tribune in 133 BCE, used his oratorical skill to gain support for popular agrarian legislation to restrict the amount of land any one person could own, resulting in the redistribution of land among the Italian people. This work would be carried out by three land commissioners.⁹⁹ Despite the controversial passing of the legislation and Tiberius Gracchus' later murder by conservatives who opposed this policy, land commissioners were appointed and work was carried out over the following decades by Gaius Gracchus and others.¹⁰⁰

⁹⁶ *Rhet. Her.* 3.2.2: *ut si deliberet senatus bello Italico sociis civitatem det an non.*

⁹⁷ Although the Social War is not mentioned by Cicero in the contemporary work *De Inventione*. I discuss the differences between the two texts in the next chapter.

⁹⁸ See Brunt (1965), (1971a) esp. 101-3, (1971b) 84-91; Sherwin-White (1973); Stockton (1979) 6-22; Gabba (1994); Bispham (2007) 74-160.

⁹⁹ Livy *Per.* 58.1; Vell. Pat. 2.2.1; Plut. *Ti Gracch.* 13.1; App. *B Civ.* 1.13.

¹⁰⁰ E.g. *CIL* 1².639-44 (131-23 BCE). Lintott (1994) 62-77; Mouritsen (1998) 143-50.

After Gaius Gracchus' death, the question of Italian land redistribution and citizenship seems to recede from the political spotlight for almost three decades. However, this impression is not entirely correct and in fact agrarian laws continued to be proposed, sometimes successfully, throughout the period between Gaius Gracchus' death and the Social War.¹⁰¹

An event involving Crassus marks the deterioration of relations between Rome and the Italians in the 90s BCE, not long before the *Rhetorica ad Herennium* was composed. The *lex Licinia Mucia* was passed during the consulship of Crassus and Mucius Scaevola (the Pontifex) in 95 BCE.¹⁰² It was apparently a response to the false enrolment of Italian allies onto the citizen rolls, and aimed to prosecute and remove those who had done so. Cicero, in his defence of Balbus, recalls the prosecution of at least one Italian under this law, a Titus Matrinius from Spoletum.¹⁰³ Marius had made the grant of citizenship and Marius himself defended Matrinius,¹⁰⁴ who was acquitted. As Badian emphasises, many citizens would have been paying close attention to the result of this case.¹⁰⁵ At some point during this period, too, a *lex Minicia* was passed confirming that if a Roman citizen and a non-citizen had a child, that child would take the lower status and not gain citizenship.¹⁰⁶

In light of this, it is clear that the issue of Italian citizenship and land ownership continued to concern politicians and members of the Italian community. Viewed from this perspective, the Social War is only the next chapter in an ongoing debate.¹⁰⁷ The war was triggered finally by the badly managed attempts of Livius Drusus to give something to everyone:¹⁰⁸ jury reforms for the senate, an expansion of the senate for the equestrians, colonies for the plebs, and citizenship for the Italians.¹⁰⁹ When this attempt failed, the Italians rebelled, sparking a war that would last for two years and cause incredible loss of life on both sides.

¹⁰¹ Cic. *De or.* 2.284, *Off.* 2.73, *Brut.* 136; App. *B Civ.* 1.27; Plut. *Mar.* 29. Lintott (1994) 92-103.

¹⁰² Cic. *Balb.* 48-9, *Off.* 3.47; Asc. *Corn.* 67C. Gruen (1966a) 47-9, (1968) 202-3; Lintott (1994) 102.

¹⁰³ Cic. *Balb.* 48.

¹⁰⁴ Cic. *Balb.* 49.

¹⁰⁵ Badian (1957) 334.

¹⁰⁶ Gaius *Inst.* 1.78.

¹⁰⁷ For a more nuanced interpretation of the events surrounding the Social War, see Mouritsen (1998) esp. 109-72.

¹⁰⁸ Although see Mouritsen (1998) 129.

¹⁰⁹ Diod. Sic. 37.2.2; Livy *Per.* 71; Vell. Pat. 2.13-14; App. *B Civ.* 1.35.

There are two aspects of the Social War that appear in the *Rhetorica ad Herennium*, the loyalty of Alba Fucens and Pinna, two Italian towns, and the application of the *lex Varia*. The two Italian towns appear in the Auctor's list of faults: when making a comparison, there is no need to disparage one thing in order to praise another. Hence, when comparing whether the Albensians or the Pinnensian Vestini did greater honour to the Roman republic, there is no need to criticise either of them.¹¹⁰ This suggests that the Auctor was aware of Italian towns that were loyal to Rome, and that the Italians were not a monolithic entity in opposition to the republic. This example may even reflect a real instance of a speaker praising these Italian towns in Rome, separating them from the opposition and, perhaps, emphasising their right to citizenship.

The *lex Varia* was passed in 90 BCE and aimed to punish those in Rome who had incited the Italians to rebel.¹¹¹ There are two passages in the *Rhetorica ad Herennium* that have been identified as relating to the law.¹¹² The first, longer passage is an example of the Middle style of speaking given at the beginning of Book 4. The speaker argues that the allies, knowing Rome, would not have dared to rebel without encouragement (especially because of what happened to Fregellae); this example seems to justify the introduction of the law itself. The mention of Fregellae in this context reaffirms that these events were perceived as connected by Romans at the time. The second related passage seems to come from one of the subsequent trials and accuses someone directly of 'estranging and alienating' the minds of the allies from the republic. The Auctor uses this as an example of Interrogation (*interrogatio*). The *lex Varia* caused the exile of Lucius Memmius, Lucius Calpurnius Bestia, and Gaius Aurelius Cotta; a case was dropped against Marcus Aemilius Scaurus; threatened against Gaius Scribonius Curio; and Quintus Pompeius Rufus and Marcus Antonius were acquitted. The cases of Quintus Servilius Caepio (the Younger) and Gnaeus Pomponius are uncertain. Last but not least, Varius was convicted by his own law in 89 BCE.¹¹³

¹¹⁰ *Rhet. Her.* 2.28.45.

¹¹¹ Val. Max. 8.6.4; Asc. *Scaur.* 22C; App. *B Civ.* 1.37.

¹¹² *Rhet. Her.* 4.9.13, 4.15.22. See Mouritsen (1998) 135 for further analysis in this context.

¹¹³ For the above, see *TLRR* 100-6, 108-10 for dates, results and further references. See also Cic. *Brut.* 305; App. *B Civ.* 1.37; Val. Max. 8.6.4.

By calling the Social War the *Bellum Italicum*,¹¹⁴ the Auctor also reveals a different perspective on the war. Describing the opposition as the *socii* is clearly a Roman perspective, and refers to the position of the Italians in relation to Rome. The ‘Italian’ war recognises the separate identity of the Italian population to a greater extent.

The first law granting citizenship to loyal Italian allies was passed in 90 BCE, the *lex Julia*,¹¹⁵ and this was extended the following year by the *lex Papiria Plautia* (as deliberated upon in the *Rhetorica ad Herennium*).¹¹⁶ However, the new citizens were enrolled into new tribes rather than existing tribes (although the failed census of 89 BCE would have prevented this becoming a reality).¹¹⁷ The result of this was that they would vote last (or perhaps not at all) and have very little influence on any results. In 88 BCE, therefore, the tribune Sulpicius tried but failed to introduce a new law redistributing the tribes.¹¹⁸ Sulla marched on Rome in opposition and Sulpicius was killed while trying to escape, his body left unburied, as the Auctor records.¹¹⁹ The next year, Cinna tried again to propose a law to redistribute the new citizens more fairly, but he was expelled from Rome by his consular colleague Gaius Octavius.¹²⁰ Once out of Rome, Cinna became a focal point for discontented Italians and, along with Marius, raised support from the Italian towns creating further disruption in Italy and in Rome.¹²¹ Returning to Rome with force, and murdering important figures along the way,¹²² Marius and Cinna installed themselves as consuls for 86 BCE when, as mentioned above, Marius died only a few weeks into his seventh consulship.¹²³

The removal of Sulla to the East marks a shift in attention away from Italy in the sources.¹²⁴ A census was completed in 85 BCE by Philippus and Peperna but the numbers recorded suggest that Italian citizens were not fully enrolled until the next successful

¹¹⁴ *Rhet. Her.* 3.2.2.

¹¹⁵ *CIL* 1.709; *Livy Per.* 80; *Vell. Pat.* 2.16.4; *App. B Civ.* 1.49. For a thorough analysis of the enfranchisements resulting from the Social War, see Bispham (2007) 161-204.

¹¹⁶ *Rhet. Her.* 3.2.2; *Cic. Arch.* 7; *Vell. Pat.* 2.17.1.

¹¹⁷ *Cic. Arch.* 11.

¹¹⁸ *App. B Civ.* 1.55, 60; *Livy Per.* 77.1-3; *Vell. Pat.* 2.19.1; *Plut. Sull.* 8-10.

¹¹⁹ *Rhet. Her.* 4.22.31. For Sulla's attitudes to the Italians, see Keaveney (2005)² 47-50.

¹²⁰ *Cic. Cat.* 3.24; *App. B Civ.* 1.64; *Livy Per.* 79; *Vell. Pat.* 2.20.2;

¹²¹ *App. B Civ.* 1.65-70; *Livy Per.* 80; *Plut. Mar.* 42.1.

¹²² *Cic. Brut.* 307; *Vell. Pat.* 2.22; *App. B Civ.* 1.71-2; *Plut. Mar.* 43.

¹²³ *Vell. Pat.* 2.23.1; *Plut. Mar.* 45.

¹²⁴ Keaveney (2005)² 64.

census in 70 BCE.¹²⁵ Nevertheless, Livy's epitomator suggests that the Italians were given a vote (in the tribal assembly) in 84 BCE (or perhaps 85 BCE).¹²⁶ The aims of Marius, Sulpicius and Cinna were therefore carried out.

Throughout these years, then, Rome's relationship with the Italians was almost constantly under debate. From Tiberius Gracchus onwards, the idea that the Italians were deserving of greater formal appreciation by the Roman republic was growing. Gaius Gracchus and those around him were the first to raise the possibility of Italian citizenship, and this remained on the agenda for the next forty years until, after a terrible war and yet more disagreements, it was finally achieved. The Auctor's attention to these momentous events is hardly surprising: he had just lived through them and witnessed them first-hand. The debates and trials of the Social War are all present. Before that, too, the men who tried to enact changes to land ownership and grant citizenship rights were often the same tribunes who the Auctor uses repeatedly in the *Rhetorica ad Herennium*; they are part of the lineage he traces from the Gracchi to Sulpicius.

When the Auctor was writing, the question of redistributing the Italian citizens amongst the tribes was still undecided. The unrest amongst the Italians continued into 86 BCE and the devastation of the previous years in terms of manpower and land would not be easy to recover from quickly. The situation must have been very difficult for many communities and this could not help but have an impact in Rome too.¹²⁷ People may have turned to Rome for refuge or to take advantage of the opportunities the city offered. In turn, these people offered new perspectives, new skills, and new challenges for the inhabitants of Rome.

Legal changes

Much of the *Rhetorica ad Herennium* is concerned with teaching its reader about forensic oratory, and the above sections have already touched upon the importance of legal trials in

¹²⁵ Cic. *Dom.* 84; Livy *Per.* 84; Val. Max. 8.13.4. For 70 BCE: Livy *Per.* 98. See Brunt (1971b) 91-9.

¹²⁶ Taylor (1960) 106; Lovano (2002) 61-3.

¹²⁷ Mouritsen (1998) 110 describes it as a 'complete upheaval of Roman-Italian relations'.

this time period and, in particular, in the Auctor's examples. Over the decades prior to the writing of the *Rhetorica ad Herennium*, the legal system in Rome had changed quite significantly. Some of this was the result of other policies discussed above, such as the land redistribution of Tiberius Gracchus, or the *lex Licinia Mucia* of 95 BCE. But there were also other developments such as the introduction of a new form of trial – the *quaestiones* – and following this, an ongoing debate about the composition of juries.¹²⁸

The first *quaestio* was created by the *lex Calpurnia* in 149 BCE and covered extortion.¹²⁹ This was the first standing criminal court to be created in Rome and it was presided over by a praetor. The first recorded case under this law probably took place in 140 BCE against Decius Iunius Silanus Manlianus, the former governor of Macedonia.¹³⁰ The *quaestiones* became increasingly important in Rome over the next decades, although the number of individual *quaestiones* prior to Sulla is debated.¹³¹ In general, the success of the system is implied by its expansion by Sulla under his dictatorship.

There were also a series of extraordinary *quaestiones* in these decades, set up to deal with particular events, such as that of 132 BCE aimed at people associated with Tiberius Gracchus,¹³² the retrial in 113 BCE of the Vestal Virgins accused of *incestum*,¹³³ and the *quaestio extraordinaria* of 109 BCE, also known as the Mamilian commission, against people accused of being bribed by Jugurtha.¹³⁴

Another significant development was the establishment of the *quaestio de maiestate* by Saturninus' *lex Appuleia de maiestate* in 103/101 BCE.¹³⁵ This replaced the charge of *perduellio* that had been tried in a centumviral court. I have discussed the Auctor's interest in Saturninus and the charge of *maiestas* against Quintus Servilius Caepio above and I will

¹²⁸ For an overview of criminal and civil law in the period see Gruen (1968b); Cloud (1994); Crook (1994).

¹²⁹ Cic. *Off.* 2.21, *Brut.* 27, 106. Gruen (1968b) 8-44.

¹³⁰ See *TLRR* 7.

¹³¹ Cloud (1994) 505-30 has *quaestiones de pecuniis repetundis, ambitus, maiestatis, de veneficiis, and de sicariis* (with hesitation) in existence prior to 86 BCE. See Gruen (1966a) 63, (1968) 184; Jones (1972) 53-6.

¹³² See *TLRR* 15-7, 19. Gruen (1968b) 60-1.

¹³³ See *TLRR* 41-4. Gruen (1968b) 127-30.

¹³⁴ See *TLRR* 52-7. Gruen (1968b) 142-52.

¹³⁵ Cic. *De or.* 2.25.107, 49.201. Gruen (1968b) 167-8. See Bauman (1970) 16-35 for his argument regarding *maiestas* prior to Saturninus' law.

return to this subject in the chapters that follow.¹³⁶ The offence (*maiestas rei publicae minuta*) was poorly defined by Saturninus' original law creating challenges (or opportunities) for those within the legal system. It was reissued by Sulla as the *lex Cornelia de maiestate*, although perhaps with little improvement.¹³⁷

As a consequence of the creation of the *quaestiones*, a debate also arose about who should staff them. As part of Gaius Gracchus' legislative programme during his tribuneship, he passed a law transferring the control of the juries from the senators to the equestrians.¹³⁸ As the ancient commentators affirm, this granted the equestrians a great deal of power and authority over their notional superiors, the senators. Although this may have caused opposition, it was not until 106 BCE that Quintus Servilius Caepio the Elder proposed a law to restore the juries to the senators.¹³⁹ It was in favour of this law that Crassus made his particularly famed speech.¹⁴⁰ Only a few years later, the tribune Glaucia reversed the effects of Caepio's law and the juries remained in the hands of the equestrians throughout the 90s BCE.¹⁴¹ After a series of acquittals, the equestrians' conviction of Publius Rutilius Rufus in 92 BCE triggered demand for change,¹⁴² which Livius Drusus tried to provide in 91 BCE.¹⁴³ As discussed above, his attempts at reform did not work.

In the aftermath of the Social War, the *lex Plautia* was passed, which decreed that 15 people from each tribe would be selected for the pool of jurors.¹⁴⁴ As this law did not stipulate the status of the people selected it is likely that they were the most influential men, a mix of equestrians and senators, although men from the new Italian tribes should

¹³⁶ See Chapter 5.

¹³⁷ Lintott (1968) 118.

¹³⁸ Diod. Sic. 34.25, 37.9; Livy *Per.* 60; Vell. Pat. 2.6, 13; App. *B Civ.* 1.22. Balsdon (1938); Gruen (1968b) 87-91; Griffin (1973); Stockton (1979) 138-53; Lintott (1994) 81; Suarez Piñero (2000) 256.

¹³⁹ Cic. *Clu.* 140, *Orat.* 1.225, 2.199, *Brut.* 43, 44, 63, 86, 161, 164. Gruen (1968b) 158-9; Suarez Piñero (2000) 259.

¹⁴⁰ Cic. *Brut.* 160.

¹⁴¹ The date is not certain. Cic. *Brut.* 62, 224, *Verr.* 1.9, 2.1, *Balb.* 23, 24, 54. Gruen (1968b) 166-7; Suarez Piñero (2000) 261.

¹⁴² Livy *Per.* 70; Vell. Pat. 13; Asc. *Scaur.* 21C. Gruen (1968b) 204-14.

¹⁴³ Cic. *Rab. Post.* 14-8, *Clu.* 143-58; Diod. Sic. 37.2.2; Livy *Per.* 71; Vell. Pat. 2.13-4; App. *B Civ.* 1.35. Weinrib (1970); Suarez Piñero (2000) 263-4.

¹⁴⁴ Asc. *Corn.* 79C. Gruen (1965a) 68-70, (1968b) 221.

also have been included (even, as Asconius says, ‘*ex ipsa plebe*’). One example from the *Rhetorica ad Herennium* illustrates this situation:¹⁴⁵

Those of you, men of the jury, who love the name of the senate, must hate this man; for he always aggressively opposed the senate. Those of you who would like the equestrian station to be the most illustrious in the state should want to give him the greatest punishment, so that in his disgrace he is not a shameful stain on the most honourable order.

This example shows the speaker appealing to senators and equestrians who were serving on the same jury, illustrating how the changing legal situation would have a direct impact on the construction of oratorical speeches. A more diverse audience would mean an advocate had to take into account a broader range of interests so as to gain the confidence of all listeners. This is something that a rhetorical teacher such as the Auctor would have to consider.

I have already touched upon the changes in the legal situation as a result of the debate about Italian land and citizenship. Following Tiberius Gracchus’ legislation restricting the amount of land anyone could own, requiring the remainder to be redistributed, Appian records that there were a great number of legal trials. Accusations on all manner of topics began before the law was even passed,¹⁴⁶ but immediately afterwards disputes arose about the selling and division of land, contracts and allotments, public and private land.¹⁴⁷ Appian describes these trials as ‘difficult’ (δίκαι χαλεπαί), as can well be imagined: landowners across Italy had to fight to secure their property. As they were not all citizens, it would have been difficult for many Italians to secure a trial at Rome as they would require a sponsor to bring the case. Despite this limitation, it is likely that there were still many cases across Italy and in Rome dealing with these problems, which would have continued for years as the work of the land commissioners progressed, reinforced by Gaius Gracchus.

¹⁴⁵ *Rhet. Her.* 4.35.47: *Qui vestrum, iudices, nomen senatus diligit, hunc oderit necesse est; petulantissime enim semper iste obpugnavit senatum. Qui equestrem locum splendidissimum cupit esse in civitate, is oportet istum maximas poenas dedisse velit, ne iste sua turpitudine ordini honestissimo maculae atque dedecori sit.*

¹⁴⁶ App. *B Civ.* 1.10.

¹⁴⁷ App. *B Civ.* 1.18.

As seen above, the *lex Licinia Mucia* created lawsuits against Italians in particular, as evidenced by the trial of Titius Matrinus defended by Marius.¹⁴⁸ The situation changed enormously for the Italians upon gaining citizenship, however. As Roman citizens, they now had access to the Roman legal system if they could travel to Rome. The Italian involvement in the Roman legal system must have caused a huge upswing in the number of cases being processed by the law courts in the Roman forum and therefore increased demand for advocates and other members of the legal profession.

Studying the legal reforms, debates and developments of the decades prior to the *Rhetorica ad Herennium*, it is clear that the Auctor and other rhetoricians would have had a great deal to consider. The introduction of the *quaestio* brought changes to the context and opportunity for legal trials, while debates around the composition of the jury raised questions about who an advocate was speaking to and how. Possible disputes over land may have brought new parties with different causes to Rome, and after the Italians gained citizenship there was great potential for new plaintiffs and even personnel. Writing in the wake of these changes, the Auctor is fully aware of them and the *Rhetorica ad Herennium* can be viewed as his response to them. The suggestion is that forensic oratory will continue as before, to some extent, but new voices will be heard on both sides.

I began this chapter by discussing recent Roman history as it appears in the *Rhetorica ad Herennium*, and I have ended by suggesting that this account is a reflection of the Auctor's experience of events. It is clear, I hope, that the historical events surrounding the *Rhetorica ad Herennium* ought to be considered when examining the text. Yet the *Rhetorica ad Herennium* is primarily intended to be a rhetorical handbook, and the traditions of rhetorical theory are another aspect of its context that must be taken into consideration, as I do in the next chapter.

¹⁴⁸ Cic. *Balb.* 48-9.

Chapter 2: A rhetorical handbook

The *Rhetorica ad Herennium* is the first complete surviving rhetorical handbook in Latin. As such, it is a significant piece of evidence for the development both of the rhetorical tradition and of technical literature in Rome.

This chapter will roughly follow the Auctor's own pathway through rhetorical theory, proceeding through the five functions of the orator as he does, taking first Invention, then Arrangement, Delivery, Memory, and Style.¹ For each function I will place the Auctor's presentation within its rhetorical context by comparing it with other relevant works. This will help to highlight where he may have made consciously divergent decisions or has been influenced by a different line of thought. These differences are particularly illuminating for the Auctor's approach to rhetorical theory, his teaching methods, and his consideration of the reader. They show that he is consistently focused on providing a practical and useful learning experience.²

A comparison with Cicero's *De Inventione* will show that there are important structural differences between the two works as well as other minor variations, but this work can only provide a comparison for the Auctor's discussion of Invention. It will also be important to consider the relationship between the *Rhetorica ad Herennium* and the rhetorical theory of other recent sources, such as the common Latin source for the two works and Marcus Antonius' *libellus*. The works of Greek rhetoricians Aristotle (4C BCE), Theophrastus (late 4/early 3C BCE) and Hermagoras (mid 2C BCE) were also influential, although they are chronologically more distant. At times it will also be useful to provide an alternative first century context by looking at Cicero's later works *De Oratore* and *Orator* as well as Quintilian's *Institutio Oratoria* from the first century CE, which was heavily influenced by Cicero's work.

¹ As introduced in *Rhet. Her.* 1.2.3, where he gives the traditional order: *inventio, dispositio, elocutio, memoria, pronuntiatio*. Cf. *Cic. Inv. rhet.* 1.7.9.

² See Chiron (2008) for his argument regarding the practical character of Aristotle's *Rhetoric* and his approach to the *Rhetorica ad Alexandrum*, Chiron (2010).

Before introducing the five functions of an orator, the Auctor gives the three types of causes they may be involved in: Epideictic (*demonstrativum*), Deliberative (*deliberativum*) and Judicial (*iudiciale*).³ The three types of causes are then dealt with separately under Invention. As the Auctor considers the Judicial cause the most complicated Books 1 and 2 are dedicated to this cause alone,⁴ while the application of Invention to Epideictic and Deliberative causes is dealt with more briefly in the first part of Book 3. The four other functions of an orator are applicable to all three types of cause.

Invention

Invention (*inventio*) is the first function of the orator that the Auctor discusses and it is also the longest, spanning Books 1 and 2. As many of the examples used in these two books will be treated in later chapters, I will pass over them here and focus on the theory instead.

The structure of the Auctor's discussion of Invention is determined by another series of subdivisions, the parts of speech (*partes orationis*), which derive from Aristotle: Introduction, Statement of Facts, Division, Proof, Refutation, and Conclusion.⁵ In fact, much of the discussion in the Auctor's first two books takes place nominally within the Proof and Refutation section.⁶ This is because the Auctor chooses to embed another theoretical framework into his rhetorical system at this point: Hermagoras' *stasis* theory.

By doing this, the Auctor is merging together two different approaches to the construction of a speech (Aristotelian and Hermagorean), but he does not acknowledge this or even refer to the two earlier authors by name.⁷ The difficulty of trying to reconcile these two theoretical systems is made clear by the different approach taken by Cicero, who

³ *Rhet. Her.* 1.2.2. Cf. *Cic. Inv. rhet.* 1.5.7.

⁴ *Rhet. Her.* 2.1.1.

⁵ *Rhet. Her.* 1.3.4: *exordium, narratio, divisio, confirmatio, confutatio, conclusio*. Cf. *Cic. Inv. rhet.* 1.14.19 where slightly different terms are used: *exordium, narratio, partitio, confirmatio, reprehensio, (digressio), conclusio*.

⁶ Starting at *Rhet. Her.* 1.10.18.

⁷ Gaines (2007) 166-8; Heath (2009) 65. For the development of Aristotelian rhetoric after Aristotle, Solmsen (1941), who comments 'generally speaking, post-Aristotelian theories of the rhetorical argumentation show a curious mixture of Aristotelian and un-Aristotelian features; and we have to admit that the latter have, on the whole, attained a dominating position' (177).

introduces Hermagoras' theory before introducing the parts of speech instead.⁸ Indeed, Cicero believes that his own approach resolves the 'mistakes' made by Hermagoras; in fact his own confusion emphasises the lack of clarity surrounding the theory itself.⁹ Clearly, when the Auctor and Cicero were writing, the solution to this problem had not yet been found and they were able to respond by adapting the theory in whichever way they felt most appropriate.

Stasis theory was developed in the second century BCE by Hermagoras of Temnos, whose work is now lost.¹⁰ This theory is used by the orator to discover what kind of issue is being dealt with and hence what kinds of arguments should be used. Hermagoras taught that there were four kinds of issues, which he called *staseis* (plural of *stasis*). The Auctor (and Cicero in *De Inventione*) calls these *constitutiones* (plural of *constitutio*) but they are also later called *status* in Latin, which corresponds more literally to the Greek term.¹¹ The Auctor does not go into any great detail about what the *constitutio* actually is, giving a simple sentence-long definition which belies the complexity of the subject: 'the *constitutio* is the first plea of the defence counsel combined with the charge of the prosecution'.¹² In contrast, Cicero spends quite some time discussing the *constitutiones* and giving examples, describing the *constitutio* as a 'question' (*quaestio*) that must be answered in each case.¹³ Just like Quintilian in his later account, the Auctor shows a lack of interest in quibbling over the finer details of different terms 'by which', in Quintilian's words, 'the same thing is understood' (*quo idem intellegatur*).¹⁴ By glossing over the details, the Auctor keeps his account straightforward and practical.

Hermagoras placed his four *staseis* within a larger category of rational questions (ζητήματα λογικά). His four *staseis* are used by Cicero in *De Inventione*, who gives them Latin names: *coniecturalis* (Conjectural), *definitiva* (Definitive), *generalis* (Qualitative),

⁸ *Constitutiones*: Cic. *Inv. rhet.* 1.8.10-14.19; the parts of speech take up the remainder of Book 1.

⁹ Cic. *Inv. rhet.* 1.9.12-10.14.

¹⁰ For a discussion of Hermagoras' work, based largely on the *Rhetorica ad Herennium* and Cicero's *De Inventione*, see Matthes (1958), (1962); Barwick (1964), (1965a), (1965b); Calboli Montefusco (1986); Heath (1994), (2002).

¹¹ As in Quintilian, see his full discussion in *Inst.* 3.6.

¹² *Rhet. Her.* 1.11.18: *constitutio est prima deprecatio defensoris cum accusatoris insimulatione coniuncta*. See Kennedy (1972) 114-26 for Hellenistic additions to rhetorical theory including the *staseis*. For an introduction to the whole *ars rhetorica*, see Clarke (1996) 23-37, esp. 26-7; Steel (2009). See Lausberg (1998) for an in-depth treatment of the different parts of rhetoric (mainly as according to Aristotle).

¹³ Cic. *Inv. rhet.* 1.8.10-12.16.

¹⁴ Quint. *Inst.* 3.6.21.

and *translativa* (Translative).¹⁵ These subdivisions deal with cases about questions of ‘fact or definition or nature or the legal process’ respectively.¹⁶ Like Hermagoras, Cicero then treats the ‘controversies which arise from written documents’ separately;¹⁷ they appear in Hermagoras’ system as a distinct category of legal questions (ζητήματα νομικά). One disadvantage of this system is that topics relating to the law arise twice, both inside and outside of the system of *constitutiones*.

In reference to Hermagoras’ theory, but without naming him explicitly, the Auctor notes that some (*alii*) give four *constitutiones*. However, the Auctor says that he will follow ‘my teacher’ (*noster doctor*) and give only three *constitutiones*: *coniecturalis* (Conjectural), *legitima*, (Legal) and *iuridicialis* (Juridical).¹⁸ These are, respectively, issues about the facts of a case,¹⁹ with or about a written text,²⁰ and whether an act was right or wrong.²¹ This difference between the four *constitutiones* of Cicero and the three of the Auctor is not simply a case of taking away one of them; the Auctor actually incorporates all the same material as Cicero but in a significantly different formulation.

When compared to Cicero’s *constitutiones*, the Conjectural issue is the same in both, and the Auctor’s Juridical issue is parallel to Cicero’s Qualitative issue (the subdivisions of which are *negotialis* and *iuridicialis*).²² However, the Auctor’s Legal issue parallels Cicero’s treatment of the five kinds of written documents, which are ‘separate from the *constitutiones*’.²³ This means that the Auctor has included within the theory of *constitutiones* a section that was not there in Hermagoras. The Auctor then treats Cicero’s *constitutio* Definition (*definitio* as opposed to *definitiva*) as a sub-section of this Legal issue. He also does not completely discard the fourth *constitutio* (called *translatio* by the Auctor, *translativa* by Cicero) but instead makes it a subdivision of the Juridical issue. He

¹⁵ Cic. *Inv. rhet.* 1.8.10 for a summary. Dugan (2013) gives an overview of Cicero’s rhetorical theory across his treatises; Gaines (2007) provides an excellent, balanced comparison of the theories in the *De Inventione* and *Rhetorica ad Herennium*.

¹⁶ Cic. *Inv. rhet.* 1.8.10: *omnis res...aut facti aut nominis aut generis aut actionis continet quaestionem*.

¹⁷ Cic. *Inv. rhet.* 2.40.116-51.154.

¹⁸ *Rhet. Her.* 1.11.18. As discussed in the Introduction, this bears some resemblance to the system attributed to Antonius by Quintilian (cf. Calboli [1972]). For the differences between the Auctor and Cicero here, see also Barwick (1965a).

¹⁹ *Rhet. Her.* 1.11.18.

²⁰ *Rhet. Her.* 1.11.19.

²¹ *Rhet. Her.* 1.14.24.

²² Cic. *Inv. rhet.* 2.21.62-23.70.

²³ Cic. *Inv. rhet.* 1.13.17.

explains this by saying that it is rarely used in the Roman courts, a valid reason for its demotion.²⁴

Cicero, then, seems to make greater use of the structure attributed to Hermagoras while the Auctor follows his own teacher more directly. This has led some, such as Herbolzheimer, to argue that Cicero was supplementing the common Latin source with the work of Hermagoras directly.²⁵ However, this assumes that Cicero rather than the Auctor is deviating from the common Latin source and that the common Latin source is the Auctor's '*noster doctor*'. As discussed in the Introduction, this may not be the case.

In fact, it could be argued that it is the Auctor who goes further than Hermagoras and Cicero to make his model genuinely useful and thus his theory might demonstrate greater adaptation.²⁶ The Auctor's model is simplified, having fewer categories, and places each of the key ways of arguing within the *constitutiones* system, instead of separating the arguments surrounding written documents. It could also be argued that, as a result, each of the Auctor's three *constitutiones* relates directly and explicitly to the forensic context, which forms the major focus of the work. Additionally, the system that Cicero adopts in his later works such as *Partitiones Oratoriae* to explain the three different methods of prosecution is very similar to the Auctor's, although they are not called *constitutiones* or *status* but simply *causae*.²⁷ This suggests that the move from four to three *constitutiones* was both a possible and a reasonable progression to make.²⁸

The same could also be argued for the introduction and placement of the theory as a whole within the two works. Initially, Cicero's decision to discuss the *constitutiones* first before the parts of speech seems to make sense, as it is useful to know what kind of case is being argued before commencing.²⁹ And yet, as he then moves into discussing the parts of speech, it is not immediately clear to the reader what the relevance of the *constitutiones* is,

²⁴ *Rhet. Her.* 1.12.22. See further discussion in Chapter 6.

²⁵ Herbolzheimer (1926) 398.

²⁶ Calboli (1972) 135 for the likely division in Antonius' *libellus* and Calboli's implication that there is chronological development.

²⁷ *Cic. Part. or.* 29.101-2.

²⁸ As Quintilian records (*Inst.* 3.6), advocates of any number of *status (constitutiones)* between one and eight could still be found in the first century CE.

²⁹ Quintilian also does this, discussing the *status (constitutiones)* in 3.6 and then moving to the parts of speech, beginning with the *exordium* in Book 4.

or how they should be used. By contrast, the Auctor begins with the other parts of speech, on the basis that at least the Introduction and Statement of Facts (although perhaps not the Division) should (or could) be prepared with reference to other information. It is only when it comes to deciding upon what Proof to use that the type of case being argued becomes acutely important. Whether this approach would work or not, it does seem to be an attempt to connect different parts of rhetorical theory together in a more user-friendly and streamlined way.

The accounts of the application of Invention to the other two types of cause, Epideictic and Deliberative, are much shorter. The treatment of Deliberative and Epideictic oratory is roughly the same length in both the *Rhetorica ad Herennium* and the *De Inventione* and the two works cover the same topics. However, there are notable differences in the presentation of the material by the respective authors. Cicero tags the discussion onto the end of his second book about Invention,³⁰ whereas the Auctor chooses to place the discussion in a separate book,³¹ having completed his discussion of Judicial oratory at the end of his Book 2. This subtle shift in focus maintains the unity of the approach to Judicial oratory in the *Rhetorica ad Herennium* which is methodologically distinct from the approach to Deliberative and Epideictic causes where the *constitutiones* do not apply.

Cicero, by grouping all three types of cause together, must explain this difference, which he does by saying that some speeches have their appropriate *loci* as well as *constitutiones*. In fact the Deliberative and Epideictic speeches were less theorised about and were thus still treated under Aristotle's system, which first gave a particular aim to each type of speech.³² After making this (slightly unhelpful) introductory point, Cicero launches into the subdivisions of each type of speech and proceeds through the list with only an incidental reference to the context of Deliberative speeches and no advice on application.³³ He refrains from repeating the subjects of praise and censure and finishes rather abruptly with a concluding paragraph about Invention, at which point the work ends.³⁴

³⁰ Cic. *Inv. rhet.* 2.51.155-59.178.

³¹ *Rhet. Her.* 3.2.2-8.15.

³² Arist. *Rh.* 1.3.

³³ Cic. *Inv. rhet.* 2.55.167.

³⁴ Cic. *Inv. rhet.* 2.59.177.

The Auctor, by contrast, begins his discussion of each cause by giving a succinct description of what they are, complete with examples. These examples are the same as Cicero's but in the *De Inventione* they are found in the middle of the enumeration of the subdivisions rather than in a prominent position at the beginning. The Auctor includes all the relevant material even when it results in some repetition, allowing this section to stand alone and removing the need to refer back to the previous part of the text. As well as giving the topics, as Cicero does, the Auctor additionally explains all the parts of speech, working clearly through the whole structure from the Introduction to the Conclusion. Most importantly, the Auctor ends his account of Epideictic oratory by emphasising to the reader the relevance of studying this type of speech.³⁵ As he says, there is rarely a need for a whole speech based on Epideictic oratory, but Judicial and Deliberative causes often involve sections of praise or blame and the described procedure can be followed there as required.

This difference suggests that the Auctor's students are not as familiar with the Deliberative and Epideictic causes as Cicero's students might be, but are still likely to use them in the future, whether in the courts or when sponsoring a cause in the *contio* or *consilium* (as the Auctor says at 3.3.4). Even at this highly detailed level it is clear that the Auctor is aware of what will be useful to his students and adapts his material accordingly, encouraging them to learn by and through examples or models.

As I have tried to show in this section, the differences between Cicero and the Auctor are significant.³⁶ When studied closely, their different approaches to the *stasis* theory of Hermagoras go right to the heart of their rhetorical systems. The variation is such that it cannot be explained away simply by saying that one of them is blindly following the Latin source and the other is deviating from it. As much as Cicero, then, the Auctor's work demands that he be given credit for using the source material intelligently and adapting it in a way that is appropriate for his purpose.

³⁵ *Rhet. Her.* 3.8.15.

³⁶ The discussion of Braet (2004) regarding the treatment of the epicheireme and the structure of argument in the *Rhetorica ad Herennium* and *De Inventione* is also relevant here, and see Gotoff (1973) on the Auctor's Aristotelian approach to periodicity as opposed to Cicero's.

The Auctor's treatment of the last four functions of an orator (Arrangement, Delivery, Memory and Style) cannot be compared with the *De Inventione*. However, there are some interesting features of these sections that deserve mention and can be compared with other known works.

Arrangement

Arrangement (*divisio*) is the second function of the orator to be discussed by the Auctor. As his discussion of Invention had already implicitly dealt with the order of the six parts of speech and the parts of an argument, there was little more to be said about Arrangement. Hence, while his discussion of Invention runs to two books of the four, Arrangement is dealt with briefly in Book 3.³⁷

One notable feature of this account is that the Auctor gives a separate category to a type of Arrangement that is adapted to the occasion (*ad tempus adcommodatur*, 3.9.17). This enables the reader to alter the order of the parts of speech as they are usually given in theory. Such an adaptation is 'often' required if there is some sort of difficulty, either with the audience, the facts of the case, or the case as a whole. This means that, despite appearing uncompromisingly rigid in parts, the Auctor's structure is in fact open to a great deal of interpretation, should it be necessary.

This is also perhaps the place to discuss the Auctor's own slightly atypical arrangement of the five functions of the orator. Although he gives them in their traditional order when introducing them at the beginning of the work,³⁸ he does not actually write the text in this way (as reflected in the layout of the current chapter). The differences are that Style has been placed at the end of the work instead of being in third position as is usual, and that Memory is placed after Delivery rather than the other way around.

³⁷ *Rhet. Her.* 3.9.16-10.18.

³⁸ As mentioned above, see *Rhet. Her.* 1.2.3. This is the order that Quintilian uses in his work.

The Auctor gives a reason for moving Style at the beginning of Book 3: that ‘there seem to be many things to say’ about it.³⁹ Indeed, the discussion of Style is long enough to merit its separate treatment, but there may also be benefits in terms of accessibility. In presenting this section on Style as a self-contained book, it can be returned to more easily as a quick reference guide. The clarity with which the ideas are defined, described and illustrated makes this a work that can still be used today. By separating Style in this way, the Auctor highlights its importance for the orator but also, perhaps, the difficulties it presents for the reader. Although the Auctor does not discuss this directly, Quintilian says that Style is the most difficult part of oratory, as everyone agrees.⁴⁰

The switch between Memory and Delivery may not be significant in and of itself, and the Auctor makes no comment about it, but it is nevertheless interesting that the Auctor is able and confident in his own arrangement of the functions. He does not feel bound by tradition on this point, and is more than willing to order them as it suits him. Indeed, he seems to follow his own advice about adapting the material to the occasion.

Delivery

The Auctor begins his account of Delivery (*pronuntiatio*)⁴¹ by noting that ‘many’ think it is the most important function of the orator and he agrees that it is indispensable,⁴² although not perhaps more so than the other four functions. Cicero in his later works takes a slightly different view, repeating the anecdote of Demosthenes’ response when questioned about what the three most important elements of oratory were: delivery, delivery, delivery.⁴³ Both Cicero and Quintilian, in close connection with this anecdote, emphasise that a well-delivered speech will outshine a badly delivered one, whatever its other merits. This may not have been very encouraging for students. By contrast, the

³⁹ *Rhet. Her.* 3.1.1: *quia plura dicenda videbantur*.

⁴⁰ Quint. *Inst.* 8.pr.13: *partem operis, ut inter omnis oratores convenit, difficillimam*.

⁴¹ Quint. *Inst.* 11.3.1: *Pronuntiatio a plerisque actio dicitur, sed prius nomen a voce, sequens a gestu videtur accipere... quapropter utraque appellatione indifferenter uti licet* (‘*Pronuntiatio* is called *actio* by many people, but the first seems to take its name from the voice, and the second from gesture... hence it is acceptable to use each term interchangeably’).

⁴² *Rhet. Her.* 3.11.19–15.27. Steel (2009) 88: ‘However difficult these accounts of delivery are, it is clear that formalized gestures and modes of voice delivery were an accepted and important element in the entire package of oratorical performance.’

⁴³ Cic. *De or.* 3.41.213, *Orat.* 17.56. Cf. Quint. *Inst.* 11.3.6.

Auctor's carefully worded endorsement of all five functions of the orator justifies the study of rhetorical theory as a whole and thereby emphasises the relevance of his whole text.

Just as he did at the beginning of the work, the Auctor explains his treatment of Delivery by criticising his predecessors: 'no one has written carefully about these things',⁴⁴ perhaps because they did not think it could be done. The lack of evidence means that, as elsewhere, it is hard to verify this statement. It was Theophrastus, the pupil of Aristotle, who was influential in establishing the connection between voice and gesture in the Hellenistic period, but his earlier work does not survive for comparison.⁴⁵ Quintilian notes that Lucius Plotius Gallus produced a work on Delivery (*de gestu*),⁴⁶ which may have been written around the same period (although he was active into the 50s BCE).⁴⁷ The lack of reference to any other works would seem to support the Auctor's claim that there had not been much written on Delivery, although it is an argument from silence. If Plotius Gallus did write his work around the same time this may support the Auctor's idea that there was a gap for writers such as himself and Plotius Gallus to fill.

At the end of the account, the Auctor admits that this has been a great task to undertake (*quantum...negotii*) and he himself was not confident that he could do it (*verum nec hoc confisus sum posse fieri*).⁴⁸ This suggests that the Auctor is not only doing something new in terms of rhetorical theory, but also that he has no prior experience of explaining the subject in this way (or, it would seem, of being taught this way himself). Clearly, however, he thought that a new approach was necessary.

Delivery is divided into Voice Quality (*vocis figura*) and Physical Movement (*corporis motus*), and Voice Quality is then further divided into three: Volume (*magnitudo*), Stability (*firmitudo*) and Vocal Flexibility (*mollitudo*). The Auctor makes a distinction between Vocal Flexibility and the Volume and Stability of the voice, which cannot be so easily taught. Vocal Flexibility is distinct because can be learned using a rhetorician's precepts

⁴⁴ *Rhet. Her.* 3.11.19: *nemo de ea re diligenter scripsit*.

⁴⁵ Fortenbaugh (1985) 272. Aristotle does make references to Delivery: *Aris. Rh.* 3.1, *Poet.* 19-20, 26. See Barwick (1965b) 213-7.

⁴⁶ *Quint. Inst.* 11.3.143.

⁴⁷ *Suet. Rhet.* 26.2. Hall (2006) 220 'presumably after the Auctor's treaty had been written' (*pace* Corbeill (2002) n.52).

⁴⁸ *Rhet. Her.* 3.15.27.

(*rhetoris praeceptio*)⁴⁹ and, accordingly, the Auctor gives a systematic set of rules that the reader should follow to get their Delivery right.

Accordingly, Vocal Flexibility is divided into three tones of voice that pertain to different modes of speech: Conversational (*sermo*), Debate (*contentio*), and Amplification (*amplificatio*). These tones of voice are further divided into eight tones that are briefly defined on their own. The Auctor then goes into greater detail about each tone by discussing them in turn once more, this time matching each one with the appropriate gestures of the face and body. The gestures are quite varied and include moving the hand, leaning with the body, slapping the thigh, and animating the face.⁵⁰ Overall, the Auctor provides his reader with a brief, formulaic, but detailed set of options from which a suitable tone can easily be identified, given the right pitch, volume and intonation, and matched with a gesture – a one-stop shop, if you will.

It is worth considering whether the later surveys of Delivery found in Cicero and Quintilian support the idea that the Auctor was attempting something different. In fact, there is a clear divergence between the Auctor's approach and that of the later works, most notably in the Auctor's systematic division of the tones of voice. This strict categorisation is hardly present in Cicero and Quintilian, and while the Auctor goes on to distinguish them on the basis of mode of speech, the other two authors choose to structure their discussions differently.

Quintilian's recommendations about the appropriate tone of voice to use are based sometimes on the purpose of the speech (such as to advise or to create hatred) and sometimes on the emotion behind it (such as anger or fear).⁵¹ The tone of voice taken in each situation is given more as a suggestion, one of a range of options, as opposed to the rigid stipulations of the Auctor. In *De Oratore*, Cicero defines his tones of voice by the emotion they are suited to (such as anger, fear or joy),⁵² which seems to derive from the work of Theophrastus. As Athanasius describes it, Theophrastus' theories were also based

⁴⁹ *Rhet. Her.* 3.13.23.

⁵⁰ *Rhet. Her.* 3.15.26-7.

⁵¹ *Quint. Inst.* 11.3.63-5.

⁵² *Cic. De or.* 3.57.216-59.223.

on an understanding of the emotions in order that bodily gesture and vocal pitch were in harmony with the whole.⁵³ Even earlier, Aristotle had also seen the expression of emotions as an important outcome of managing the voice.⁵⁴ By contrast, the Auctor's system bears more relation to the modes of speech that Aristotle attributes to the art of Delivery in his *Poetics*, which are said to include orders, prayers, questions and answers.⁵⁵

As opposed to the Auctor's (over-)formulated advice about what gestures match which tone, the reader of Cicero's account is left to decide the most appropriate actions, which are 'in keeping with the actual kind of speech'.⁵⁶ Cicero lists possible gestures of each part of the body with a particular focus on the eyes, but this whole section is quite brief.⁵⁷ Quintilian's longer and more detailed discussion follows Cicero in making the head and eyes the most important part of gesture,⁵⁸ and warns again that gestures should arise from the subject of the speech. Neither writer goes as far as the Auctor in connecting tones of voice directly with particular gestures, although Quintilian is equally prescriptive in other ways. For example, Quintilian suggests that one specific gesture (bringing the middle finger and thumb together whilst extending the other fingers) is particularly useful in the *exordium* and *narratio*,⁵⁹ and discusses another gesture suited for denunciation and indication;⁶⁰ the Auctor's connections between gesture and tone are not entirely unparalleled. The need to be flexible and adapt the delivery to the content of the speech recurs throughout Quintilian's account, summarised towards the end when he remarks that 'often different things are appropriate for different people' (*saepe aliud alios decere*).⁶¹ This gives the orator a choice and more realistically reflects the wide variety of situations an orator might face.

Nevertheless, the accounts of Cicero and Quintilian are not as neat or simple to grasp as the Auctor's, despite being perhaps more pragmatic. It is noticeable too that the Auctor

⁵³ Athanasius *Prefatory Remarks to Hermogenes' On Issues* (*RhG* vol. 14 p.177.3-8 [Rabe]) as quoted in Fortenbaugh (1985) 270.

⁵⁴ Arist. *Rh.* 3.1 1403b28.

⁵⁵ Arist. *Poet.* 19 1456b10-13.

⁵⁶ Cic. *De or.* 3.59.223: *apte cum genere ipso orationis*. Much has been written about gestures, see Graf (1991); Aldrete (1999); Corbeil (2002b), (2004); Hall (2006). See Wisse (2013) for an excellent enquiry into good and bad Delivery.

⁵⁷ Cic. *De or.* 3.49.220-2.

⁵⁸ Quint. *Inst.* 11.3.68-72.

⁵⁹ Quint. *Inst.* 11.3.92.

⁶⁰ Quint. *Inst.* 11.3.98.

⁶¹ Quint. *Inst.* 11.3.177.

(unlike Cicero and Quintilian) does not use any examples here, which might necessitate a very specific level of cultural understanding regarding how speeches or performances have been given in the past. This might point to an audience from outside Rome who would not grasp these nuances. It might also simply be an indication that the Auctor thought his explanation clear enough without any examples.

In any case, the Auctor's theory of Delivery succeeds (if that is the right word) in providing a basic model, albeit somewhat limited, which can be systematically applied by the orator. It might be that this systematic element is what the Auctor thought needed to be 'carefully' (*diligenter*) done and where he intentionally differed from more abstract and generalising accounts such as those of the two later works.

Memory

These same themes recur in his account of Memory (*memoria*). Again, the importance the Auctor places on Memory is clear from the start of his account: he introduces it as the 'store-house of *inventio*' (*thesaurus inventorum*) and the 'keeper of all parts of rhetoric' (*omnium partium rhetoricae custos*).⁶² Although Memory might be considered a natural talent, the Auctor must emphasise his ability to teach the skill of Memory through theory in order for his work to be worthwhile. Hence the Auctor states his own certainty that there is such a thing as a theory or system of Memory (*artificium memoriae*).

The Auctor continues to try and make the theory of Memory seem accessible and achievable by emphasising that even those who have a naturally good memory also need to train and improve. The use of backgrounds (*loci*)⁶³ for remembering items is compared first to reading the letters of the alphabet aloud and then to recognising acquaintances standing in a line.⁶⁴ These two activities are both so easy as to be done unconsciously and with these illustrations the Auctor implies the ease with which this method can be attained and carried out. According to him, the use of backgrounds is not only useful for people

⁶² *Rhet. Her.* 3.16.28.

⁶³ See *Rhet. Her.* 3.16.29 for the Auctor's definition of *loci* in this context.

⁶⁴ *Rhet. Her.* 3.18.31-19.31.

with a lot of knowledge but for others too, who, even if they think they do not have suitable backgrounds, will in actual fact be able to produce as many as they like.⁶⁵ For the creation of images to place within these backgrounds, the Auctor also emphasises that ‘training and theory’ (*doctrina atque ars*) are more reliable than natural ability.⁶⁶

F. Müller has produced a detailed study of the memory systems given by the Auctor,⁶⁷ Cicero in *De Oratore*,⁶⁸ and Quintilian.⁶⁹ He uses this study to conclude that, by comparison with the other two authors, the Auctor is highly uncritical of his source material and even gullible in the way that he adopts the impractical Greek system for his own work.⁷⁰ However, at the end of his account the Auctor acknowledges the flaws in the Greek method of writing out word lists to be memorised and used for images,⁷¹ which demonstrates that he was not simply copying the system unthinkingly. Indeed, he claims to know that most Greek writers have produced such lists, suggesting that he was familiar with a wide range of the available literature. No such sources are available today and indeed there is no evidence for the development of the place of memory within rhetorical theory between Aristotle’s *Rhetoric* and the *Rhetorica ad Herennium*.⁷² Cicero’s references to Simonides’ feat of memory in remembering the seating arrangement of his friends after their death at a banquet do not provide a great deal of information,⁷³ and the ancient sources, as Quintilian notes, were in disagreement.⁷⁴ Cicero himself is not sure whether it was ‘Simonides or someone else’ (*sive Simonides sive alius*) who actually invented the mnemonic theory of using backgrounds and images.⁷⁵ However, Cicero’s reference to Metrodorus of Scepsis and references from other sources imply that Metodoros was an influential figure in advancing the theory of Memory in the second half of the second

⁶⁵ *Rhet. Her.* 3.19.32. Baroin (1998) argues that houses were well suited to this task of providing backgrounds because they were already places of memory.

⁶⁶ *Rhet. Her.* 3.21.34.

⁶⁷ *Rhet. Her.* 3.16.28-24.40.

⁶⁸ *Cic. De or.* 2.351-60.

⁶⁹ *Quint. Inst.* 11.2. See Müller (1996).

⁷⁰ Müller (1996) 73. As Müller thinks the Auctor’s readership amounts only to Herennius, he also argues that the Auctor includes elements that are irrelevant to this private audience: 75-6.

⁷¹ *Rhet. Her.* 3.23.38.

⁷² See Barwick (1965b) 213.

⁷³ *Cic. De or.* 2.87.357.

⁷⁴ *Quint. Inst.* 11.2.14-6.

⁷⁵ *Cic. De or.* 2.87.357.

century BCE, including perhaps the origin of the wax tablet metaphor that appears in all three later authors.⁷⁶

The theory involving backgrounds and images, whether or not it derived from Metodoros, seems to have been the dominant one. As such the Auctor may not have had much choice or seen any need to alter the basic principles. Cicero in *De Oratore* gives the same technique, despite Antonius' seeming reluctance to discuss a subject so 'familiar and widely known' (*nota et pervulgata*).⁷⁷ Quintilian also introduces his reader to the technique before turning to his own preferred method based on repeated readings and knowing the structure.⁷⁸

The practicality of the Auctor's account should also be given more weight than Müller allows. As the Auctor says, 'it is the duty of the instructor to teach how something should be sought, and to supply one or two such examples (so that the technique is clearer), but not every case of an example of that kind'.⁷⁹ This might be taken as a summary of the Auctor's approach to the whole work: to give a few examples and let the rest follow from practice. Indeed, the final paragraph of this explanation (and of the third book) is another exhortation to the reader to exercise his memory every day, because it will come in especially useful when his mind is taken up 'with some rather important business' (*cum aliquo maiore negotio*).⁸⁰

In his account of the theory of Memory, then, the Auctor tries to impress upon his audience the importance of knowing and practising the system, but he is also aware of first trying to make it an approachable and accessible subject that can be learned, just like the letters of the alphabet, by all kinds of people.

⁷⁶ Cic. *De or.* 2.88.360; Plin. *HN* 7.24; Quint. *Inst.* 11.2.22. For the comparison of the Memory system with reading letters from wax tablets see *Rhet. Her.* 3.18.31; Cic. *De or.* 2.86.354, *Part. or.* 8.26; Quint. *Inst.* 11.2.21 (quoting *De or.*).

⁷⁷ Cic. *De or.* 2.87.358.

⁷⁸ Quint. *Inst.* 11.2.17-26.

⁷⁹ *Rhet. Her.* 3.23.39: *praeceptoris est docere quemadmodum quaeri quidque conveniat, et unum aliquod aut alterum, non omnia quae eius generis erunt exempli causa subicere, quo res possit esse dilucidior.*

⁸⁰ *Rhet. Her.* 3.24.40.

Style

The fifth and final function of the orator that appears in the *Rhetorica ad Herennium* is Style (*elocutio*). As discussed above (in Arrangement), the importance of Style for the orator may explain why it has been placed at the end of the work.⁸¹ Indeed, the discussion of Style makes up almost half the entire work, which also suggests that it was perhaps the most significant single part. Examples are a central feature of this book, much more so than in the other parts of the work, and the Auctor begins with a lengthy discussion about the right way to use them.⁸²

After addressing the issue of examples, the Auctor begins his theory of Style proper by introducing the three kinds (*genera*) of style: Grand (*gravis*), Middle (*mediocris*), and Simple (*extenuatum/adtenuatum*), and their opposites: Swollen (*sufflatum*), Slack (*dissolutum*) or Drifting (*fluctuans*), and Meagre (*exile*).⁸³ The Auctor relies on lengthy examples to illustrate what he means by each of the styles. The use of illustrative examples at this point is different to the approach of Cicero and Quintilian but the tripartite structure, which may derive from Theophrastus, seems to have become the standard form.⁸⁴ It is found in Cicero's *De Oratore* and *Orator*, and also given by Quintilian (although he suggests that there are countless variations).⁸⁵ The most detailed of these discussions is Cicero's in *Orator* where he describes at some length the different aspects of each type of speech.⁸⁶

Both Cicero in *Orator* and Quintilian describe the speaker of the Grand style as the strongest and most powerful,⁸⁷ although Cicero cautions that it must be mixed with other styles otherwise it will seem out of place. In fact, as Cicero (in his later work) and the

⁸¹ Calboli (1998) 49 argues that *elocutio* became more important in response to the censorial edict of 92 BCE and the suppression of 'technical' rhetoric.

⁸² As I discuss in the Introduction.

⁸³ *Rhet. Her.* 4.8.11-11.16: *gravis, mediocris, adtenuata / sufflata, dissoluta* or *fluctuans, exilis*.

⁸⁴ See Kennedy (1957) for the history of the three types of Style before and after Theophrastus. Fortenbaugh (2005) discusses more generally Cicero's approach to Theophrastus' theory; Vanderspoel (2010) for Theophrastus in the context of Hellenistic rhetoric.

⁸⁵ *Cic. De or.* 3.45.177, 3.52.199, 3.55.212, *Orat.* 5.20-6.21, 23.75-28.99; *Quint. Inst.* 12.10.58-68.

⁸⁶ *Cic. Orat.* 20.69-28.99.

⁸⁷ *Cic. Orat.* 28.99; *Quint. Inst.* 12.8.63.

Auctor agree, a speech should contain a variety or mix of all three styles.⁸⁸ In line with this, the Auctor does not give a hierarchy to the three styles but only indicates that they are better than their ‘faulty’ (*vitia*) opposites. The Auctor also does not connect these three types of Style directly with three functions of the orator, unlike Cicero in *Orator*, who associates the Simple style with proving a case, the Middle style with pleasing the audience, and the Grand style with persuading them.⁸⁹ However, the three examples that the Auctor uses to illustrate the three styles do come from different parts of speeches (as Caplan notes, following J. Marouzeau), suggesting that he recognised that different styles were suited to different purposes.⁹⁰

The Grand style example comes from an Amplification of the Charge (*amplificatio criminis*), part of the conclusion of a speech. As the Auctor says in Book 2, the Amplification uses *loci communes* (commonplaces) to rouse the listeners.⁹¹ He then lists ten commonplaces,⁹² some of which are illustrated by the example of Grand style. The second commonplace in the list refers to those who will be the victim of the supposed crime, which might be ‘everyone, which is the most terrible crime’ (*omnes, quod atrocissimum est*),⁹³ and indeed in the example the speaker claims that those accused of the crime were planning, at one go, ‘the most terrible misfortunes for all citizens’ (*universis civibus atrocissimae calamitates*).⁹⁴ The details of the plan that follow (uprooting graves, despoiling temples, raping women and young men) illustrate the sixth and seventh commonplaces, which intend to show premeditation – for which the accusation of a plot is sufficient – and illustrate that it is a ‘cruel, wicked and tyrannical crime’ (*facinus crudele, nefarium, tyrannicum*).⁹⁵ The use of this example seems to suggest that the Grand style is particularly suited for these stirring passages that are designed to leave a lasting impression on the audience and ultimately persuade them.

The example given for the Middle style is part of the Proof of the Reason (*rationalis confirmatio*) of a speech’s argument. As the Auctor explains in Book 2 the Proof of the

⁸⁸ Cic. *Orat.* 22.74; *Rhet. Her.* 4.11.16.

⁸⁹ Cic. *Orat.* 20.69.

⁹⁰ Caplan (1954) *ad loc.* Cf. Marouzeau (1921), (1935). Further analysis in Deneire (2004).

⁹¹ *Rhet. Her.* 2.30.47: *Amplificatio est res quae per locum communem instigationis auditorum causa sumitur* (‘Amplification is the technique that is applied in order to arouse the listeners through commonplaces’).

⁹² *Rhet. Her.* 2.30.48-9.

⁹³ *Rhet. Her.* 2.30.48.

⁹⁴ *Rhet. Her.* 4.8.12.

⁹⁵ *Rhet. Her.* 2.30.49.

Reason is intended to support the *ratio* (Reason), which is only briefly given, using several arguments.⁹⁶ The subject of this speech seems to relate to the law passed in 90 BCE by Quintus Varius Hybrida, which sought to exile those who had incited the allies to rebellion. In the example, the speaker puts forwards several arguments to support his *ratio* that the allies had no other reasonable motive for rebellion besides the one he has identified, which would be (if the connection to Varius is correct) encouragement from traitors. The language of this example does not obviously fulfil Cicero's suggestion in *Orator* that the Middle style should please the audience. However, by combining an articulate clarity and confidence with the use of a historical example (about Fregellae), an everyday maxim, and plenty of direct questions, the audience may have been drawn in and set at ease.⁹⁷

The Simple type of speech is given third by the Auctor and the example illustrates a Statement of Facts (*narratio*),⁹⁸ which follows the Introduction to a speech.⁹⁹ The tone of voice for the Statement of Facts is given in Book 3, and comes under the category of Everyday Speech (*sermo*).¹⁰⁰ This seems to be a case of the Auctor's second kind of narrative, as described in Book 1, which aims to win trust and incriminate the opposition, as the speaker repeatedly contrasts the blushing naivety of the young man, fresh from his tutor's lessons, with the aggression of the older man. As the Auctor stipulates, the Statement of Facts should be brief, clear and plausible.¹⁰¹ The second of these qualities depends on the language used, which should not be confused, convoluted or unusual,¹⁰² but rather, as in the example, in line with the everyday manner of speaking and language use. Again, this does not tie in with the precise schema expressed by Cicero in the *Orator* of using the plain style for proofs, but it underlines the idea that there are certain styles that are more appropriate for particular parts of speeches.

⁹⁶ *Rhet. Her.* 2.18.28: *Rationis confirmatio est ea quae pluribus argumentis conroborat breviter expositam rationem.* See the example argument given at *Rhet. Her.* 2.19.28 (Ulysses and Ajax).

⁹⁷ Krostenko (2004) argues that the use of 'binary phrases' (e.g. *virtus et industria*) in this example is successful in demonstrating the speaker's Roman cultural awareness and rhetorical education as well as highlighting important themes for the listener. See also Sinclair (1993).

⁹⁸ *Rhet. Her.* 4.10.14. See Ferri and Probert (2010) for the importance of this as the 'clearest quoted example of something approaching conversational language' (18) and its implications for the 'conversational register' as used by orators.

⁹⁹ *Rhet. Her.* 1.8.11-10.16.

¹⁰⁰ *Rhet. Her.* 3.13.24.

¹⁰¹ *Rhet. Her.* 1.9.14.

¹⁰² *Rhet. Her.* 1.9.15.

It is important that the examples the Auctor chooses in this section are consistent with what he says in other parts of the work, as shown here. As a result, they serve to reinforce earlier lessons about different parts of a speech as well as to instruct the reader about the different qualities of each type of Style. However, the Auctor does not make these connections explicit, nor does he say what part of speech each example represents. Perhaps this is another attempt to simplify the rhetorical theory by refraining from overburdening each step with complications and associations; perhaps the Auctor imagined discussing these more advanced points with the reader in person. Whatever the reason, for the most part the examples are left to speak for themselves.

Indeed, the theoretical explanations that the Auctor gives for the positive examples are overall very brief. For the Grand style he advises the reader to use ornate words, impressive thoughts, and figures with *gravitas*,¹⁰³ but the Middle style is only described as ‘descending slightly’ (*aliquantulum demittere*)¹⁰⁴ and the Simple style as ‘the most humble, everyday speech’ (*infimus et cottidianus sermo*).¹⁰⁵ There are slightly longer explanations appended to the faulty styles, where the examples are shorter. These more detailed comments about what not to do help to define, conversely, what the Auctor thinks is necessary for the positive type of each. For example, for the Swollen style, a fault might be that the speech is ‘more impressive’ (*gravior*) than the occasion demands, which would be unsuitable.¹⁰⁶ The Slack or Drifting style is bad because it does not hold the listener’s attention.¹⁰⁷ The Meagre style is ‘pale’ (*exsanguis*) and ‘insignificant’ (*frivolis*), as opposed to the ‘plain and carefully selected words’ (*pura et electa verba*) a Simple type of speech should have.¹⁰⁸ By telling his readers what to do and what not to do, the Auctor reinforces his message of the right way to give a speech as well as giving his reader (some) specific directions.

In the second part of his discussion of Style, the Auctor moves on to the qualities (*res*) of Style. As J. Vanderspoel notes, Theophrastus established the four ‘virtues’ of Style in his

¹⁰³ *Rhet. Her.* 4.8.11.

¹⁰⁴ *Rhet. Her.* 4.9.13.

¹⁰⁵ *Rhet. Her.* 4.10.14.

¹⁰⁶ *Rhet. Her.* 4.10.15.

¹⁰⁷ *Rhet. Her.* 4.11.16: *Non potest huiusmodi sermo tenere adtentum auditorem.*

¹⁰⁸ *Rhet. Her.* 4.11.16.

work *On Style*, which were ‘almost universally accepted among later writers’.¹⁰⁹ These were Correctness (Ἐλληνισμός), Clarity (σαφήνεια), Appropriateness (τὸ πρέπον) and Ornamentation (κατασκευή).¹¹⁰ The same ideas are found in Cicero’s *De Oratore* and in Quintilian.¹¹¹ The Auctor is one of the later writers who did not accept Theophrastus’ four virtues, or at least, he did not reproduce them exactly. The *Rhetorica ad Herennium* gives Style three slightly different qualities or virtues: Taste (*elegantia*), Artistic Composition (*conpositio*) and Distinction (*dignitas*).¹¹² As Caplan comments,¹¹³ Correctness and Clarity are found within the Auctor’s *elegantia* (called by him *Latinitas* and *explanatio*). Artistic Composition, which was a subdivision of Theophrastus’ virtue of Ornamentation, has become a category of its own. *Dignitas* represents Ornamentation, but is limited to the Figures (of Diction and Thought).¹¹⁴ Theophrastus’ consideration of Appropriateness is not present in the Auctor’s schema but he does introduce the three divisions as being necessary for the speech to be suitable (*accommodata*).¹¹⁵ This suitability, or appropriateness, thus becomes Style’s primary goal so it is not entirely absent despite being differently framed. Calboli (with Matthes) is uncertain as to whether the origin of the Auctor’s division is Hermagorean or Rhodio-Hellenistic (from Atheneus and Apollonius Molon).¹¹⁶ These are not necessarily the only two options, but, whatever the source, it does not seem to be a coincidence that again the Auctor has opted for the simpler course with only three strands, as he did with the *constitutiones* in his theory of Invention.

The greatest part of the fourth book is taken up by the Auctor’s discussion of the Figures of Diction and Thought, which are the ornamentation of the speech’s form and of its content respectively. The Auctor divides the Figures of Diction into two parts,¹¹⁷ keeping the last ten figures separate because ‘the language departs from the ordinary meaning of the words’.¹¹⁸ These are figures such as Onomatopoeia (*nominatio*),¹¹⁹ Hyperbole

¹⁰⁹ Vanderspoel (2010) 126. In his *Rhetoric*, Aristotle emphasised clarity, avoiding meanness, and appropriateness (3.2 1404b1-5), see Fortenbaugh (2010) 119. Deneire (2004) compares the fixed *virtutes* with the more variable *vitia* in rhetorical theory. See Calboli (1998) for other Theophrastan/Peripatetic influences on the Auctor’s discussion of *elocutio*.

¹¹⁰ Cf. Diog. Laert. 7.59. Innes (1985).

¹¹¹ Cic. *De or.* 3.10.37, 3.24.91; Quint. *Inst.* 8.1.1.

¹¹² *Rhet. Her.* 4.12.17. See Caplan (1954) *ad loc.*; Calboli (1969) 287-9.

¹¹³ Caplan (1954) *ad loc.*

¹¹⁴ *Rhet. Her.* 4.13.18.

¹¹⁵ *Rhet. Her.* 4.12.17.

¹¹⁶ Calboli (1969) 300, cf. Matthes (1958) 211.

¹¹⁷ *Rhet. Her.* 4.18.19-30.41 and 4.31.42-34.46.

¹¹⁸ *Rhet. Her.* 4.31.42.

¹¹⁹ *Rhet. Her.* 4.31.42.

(*superlatio*)¹²⁰ and Metaphor (*translatio*).¹²¹ The Figures of Thought then follow. The Auctor gives the description of each figure in the same format, beginning with a short definition (usually only a sentence) and then immediately giving several examples. The examples themselves are sometimes briefly explained or interpreted further before the Auctor moves on to the next figure. For example, the Auctor comments that if the Apostrophe (*exclamatio*) is used properly, it will serve to rouse as much indignation in the listener as the speaker wants.¹²² Similarly he notes that Reasoning by Question and Answer (*rationcinatio*) is well adapted to the conversational style and will hold the listener's attention,¹²³ while three other figures are said to be more suited to a speech given for pleasure, rather than in an actual cause.¹²⁴ These surrounding comments are usually brief and to the point, while the chosen examples vary greatly in length without any seeming restriction. This balance suggests that the Auctor intends the examples to take the central role in the reader's learning experience while he gives supplementary comments and guidance from the sidelines.

Analysing the Auctor's final section on Style shows that similar themes apply here as before. The Auctor is distinct from Cicero and Quintilian in his explanation of the three kinds of Style and his simplification of the virtues of Style. Again, his catalogue of the Figures is simple, systematic, and brief, making this part of the work as approachable and practical as the others.

Conclusion

The Auctor's approach to rhetorical theory is unique amongst the surviving evidence. The divergences between the *Rhetorica ad Herennium* and *De Inventione* emphasise the extent to which the Auctor's text is fundamentally different to Cicero's contemporary work as well as the works that followed. Comparisons with the works of Cicero and Quintilian illustrate that these differences have arisen because the Auctor has prioritised his student's

¹²⁰ *Rhet. Her.* 4.33.44.

¹²¹ *Rhet. Her.* 4.34.45.

¹²² *Rhet. Her.* 4.15.22.

¹²³ *Rhet. Her.* 4.16.23.

¹²⁴ *Rhet. Her.* 4.23.32. These are Homoeoptoton (*similiter cadens*), Homoeoteuton (*similiter desinens*), and Paronomasia (*adnominatio*).

learning experience above strict conformation with rhetorical traditions. As shown by his discussion of Delivery, the Auctor is not afraid to try new things even when he is not certain that they will work.

A particular merit of the Auctor's rhetorical theory is as a work that students could use and reuse: it is intensely practical. In the spirit of the Auctor himself, one might say that this is due to the three essential qualities of the work: brevity, clarity and consideration. Brevity, in that so far as it is possible to tell, the Auctor opts for the shorter, simpler model where possible: three *constitutiones*, ten *loci communes*, three qualities of Style. His presentation of the subject is clear, giving examples, instructions and models to illustrate each of his techniques (although possibly confusing the reader further in some cases). Finally the Auctor is considerate to his audience by arranging and explaining his material sensitively, as in his treatment of Epideictic and Demonstrative speeches, and by being consistent, as shown by the examples of types of speech in the final book.

Studying the Auctor's approach to rhetorical theory also gives indications about the audience themselves from which it is possible to draw a few conclusions. They were readers who may not have been familiar with what Epideictic and Demonstrative oratory were and who perhaps would not be able to relate to examples of how speeches had been delivered. They had time to practise but might need reassurance that memory training would yield results. They were not interested in theory or current debates, or even in knowing that they were being trained in line with tradition. Of course, whether the actual audience matched the Auctor's expectations cannot be known, but the positive features that make it suitable for such a reader help to form a work that can still be a useful point of reference today.¹²⁵

And yet, this theoretical framework is only one aspect of what made the *Rhetorica ad Herennium* a useful and usable handbook. In the next chapter, I will turn to the examples that help the Auctor bring his theory to life and give his students something to work with.

¹²⁵ Although Heath (2007) preferred to use Hermogenes' *On Issues* (2C CE) for teaching rhetoric to undergraduates. I discuss audience further in Chapter 7.

Chapter 3: *Exempla* and political history

The *Rhetorica ad Herennium* was written in a turbulent period in Rome's history. After the decades of unrest following the Gracchan murders, the Social War brought conflict ever closer to the empire's core. That threat did not recede in the years after the war ended, when the Auctor was writing, as tensions remained high between powerful generals culminating in Sulla's dictatorship of 82 BCE. As I have argued in the previous chapters, this context is crucial for interpreting the *Rhetorica ad Herennium*. More than simply providing a backdrop to the text, the Auctor incorporates information about these events into the text itself through his examples (*exempla*). Reactions and responses to political and military events are preserved by the Auctor in his *exempla* and help to make the *Rhetorica ad Herennium* a powerful statement about the contemporary situation.

For this thesis to benefit from the wide-ranging analytical opportunities that *exempla* offer and to encompass the Auctor's own broad thinking on the subject (both of which I discuss further below) I will use a correspondingly broad understanding of *exempla* in what follows. To achieve this, I will follow the line of thought suggested by J. D. Chaplin who defines the *exemplum* (as used by Livy) in a highly useful way as 'anything from the past that serves as a guide to conduct within the text'.¹ This fits well with the variety of thoughts and opinions expressed in the following discussion without imposing unnecessary restrictions on the subject.

The Auctor uses *exempla* throughout his rhetorical handbook to illustrate and explain the techniques he recommends. The *exempla* are a vivid and interesting part of the handbook as they come from a range of sources and cover a variety of subjects. They are also a very important part of the text because, I argue, they represent the Auctor's own choice of subject matter. This is significant because the *exempla* often describe or refer to events from the recent past, which is both politically interesting and different to Cicero's choice of *exempla* in the contemporary *De Inventione*. This difference suggests that a greater variety of exemplary traditions existed than has been acknowledged in the past. Scholars have argued that *exempla* play a key role in shaping public views and behaviours, as well

¹ Chaplin (2000) 3.

as contributing to and representing the ‘collective memory’ in a circular way. In using these *exempla*, the Auctor both adheres to and prolongs a particular version or vision of society’s past. The fact that these *exempla* tend to relate to the recent past indicates that the Auctor thinks these events are important. They are not only recognisable for his audience but they will also contribute to shaping the discourse of the next generation. The *exempla* serve to situate the Auctor’s work and rhetoric firmly in his historical context and allow him to provide a bridge between the past and the future.

Political or practical?

Scholars have debated whether the Auctor’s *exempla* should be read as a conscious illustration of his personal views or solely as practical tools for the rhetorical student. This debate originates in the publication of Marx’s 1894 commentary of the *Rhetorica ad Herennium*. In his *Prolegomena*, Marx discusses the importance of the *exempla* that appear in the text, inferring from the Auctor’s use of particular *exempla* that the Auctor supports and endorses the views expressed by the *exempla* themselves.

By contrast, M. Gelzer argues that the practical purpose of the handbook must be born in mind, as intended for future Roman politicians, advocates in the law courts, and orators in the senate, in assemblies, or in a magistrate’s *consilium* (advisory council).² Therefore, the training offered by the handbook should provide the resources to persuade and win both sides of an argument. Hence the *exempla* were selected from well-known and respected trials and events in the recent past; they were not selected as a result of the Auctor’s own political tendencies or preferences. In fact, Gelzer says, no one who understood the purpose of a practically useful handbook would think that the Auctor used his *exempla* to express his political beliefs.³

M. A. Levi agrees with this perspective, describing the Auctor as someone who was dedicated to teaching rhetoric and aware of the benefits of using well-chosen *exempla* as

² Gelzer (1962) 216.

³ Gelzer (1962) 216-7. See Calboli (1969) 35-41 for his counter-arguments.

teaching aids to bring the subject to life.⁴ Caplan also concludes that the Auctor ‘took his material where he found it and used it to suit his primary purpose – technical instruction in the art of rhetoric’.⁵

Some scholars have conceded the usefulness of the *exempla* for understanding the period despite their reservations about what the *exempla* represent for the Auctor’s views. Levi suggests that the text should be read as the ‘testimony of an era’: although the Auctor may have been removed from political dealings, his contribution is still valid evidence for them.⁶ Similarly, although J. von Ungern-Sternberg does not accept that a ‘politically uninvolved author of a rhetorical handbook’ would have a motive for including ‘popular propaganda’, he argues that the Auctor’s *exempla* are fragments from speeches that nevertheless are such ‘propaganda’.⁷

These latter comments highlight the problem of trying to second-guess the Auctor’s intentions. As scholars admit, these *exempla* can be a useful insight into the contemporary world (as already seen in the previous chapters) and they could have been considered in this way at the time, whatever the Auctor was intending to do with his *exempla*. From an audience perspective, then, this debate has created a false distinction between the political and the practical.

And yet, the final *exemplum* of the work clearly shows the Auctor’s awareness of the roles *exempla* could play beyond a simple rhetorical tools. The *exemplum* describes the murder of Tiberius Gracchus in 133 BCE (mentioned several times elsewhere) and illustrates the last rhetorical technique of the work: *demonstratio*, Ocular Demonstration. The *exemplum* is rather long but worth quoting here in full:⁸

⁴ Levi (1966) 364. See also Pina Polo (1996) 76-7: *exempla* have been chosen for ‘stylistic and didactic reasons’.

⁵ Caplan (1954) xxiv.

⁶ Levi (1966) 364.

⁷ Ungern-Sternberg (1973) 152, 161.

⁸ *Rhet. Her.* 4.55.68: *Quod simul atque Gracchus prospexit fluctuare populum, verentem ne ipse auctoritate senatus commotus sententia desisteret, iubet advocari contionem. Iste interea scelere et malis cogitationibus redundans evolat e templo Iovis; sudans, oculis ardentibus, erecto capillo, contorta toga, cum pluribus aliis ire celerius coepit. Illi praeco faciebat audientiam; hic, subsellium quoddam excors calce premens, dextera pedem defringit et hos alios iubet idem facere. Cum Gracchus deos inciperet precari, cursim isti impetum faciunt et ex aliis alii partibus convolant, atque e populo unus ‘Fuge, fuge’ inquit, ‘Tiberi. Non vides? Respice, inquam.’ Deinde vaga multitudo, subito timore perterrita, fugere coepit. At iste, spumans ex ore*

As soon as Gracchus saw that the people were faltering, scared that he might be swayed by the senate's authority and change his mind, he ordered a *contio* to be summoned. Meanwhile that man, full of evil and criminal thoughts, rushed out of the Temple of Jupiter; sweating and eyes blazing, his hair on end and a twisted toga, he (with many others) began to speed up. The herald was readying the audience for Gracchus; but that stupid man, leaning his weight onto a bench with his heel, broke off its foot with his right hand and told the others to do the same. When Gracchus began to pray to the gods, they attacked him at a run and rushed in together from different sides. From the audience one man called 'Run, run Tiberius! Don't you see? Look out, I'm telling you!' Then the unreliable crowd, suddenly struck by fear, began to run. But that man, crime foaming at his mouth and cruelty belching out from deep within his chest, swings his arm and – while Gracchus wonders what it is and doesn't even leave the spot he has been standing on – strikes him on the head. Gracchus dies in silence, not compromising his deep-rooted virtue by crying out. But that man, splattered with the wretched blood of the very bravest soul, looked around as if he had done the most glorious deed, cheerily offered his accursed hand to well-wishers and then took himself off to the Temple of Jupiter.

The Auctor stipulates that this technique should re-enact the event before the audience as if it were happening in front of their own eyes.⁹ Indeed, the Auctor uses this phrase *ante oculos* ('before the eyes') twice, before and after the *exemplum*, underlining the intended result of this technique.¹⁰ By implication, he has placed Tiberius Gracchus' death before the eyes of his reader to the same effect. Not only does this vivid and descriptive *exemplum* satisfy the Auctor's demands to illustrate *demonstratio*, but it is unquestionably political too in the way the account differs from others.

This *exemplum* from the *Rhetorica ad Herennium* is the earliest extant description of Gracchus' death. There is a surviving fragment by a contemporary Sempronius Asellius, which may be relevant to the events around Gracchus' death, but it focuses on his pleas to the crowd and does not mention the attack itself.¹¹ The much later account of Appian (in Greek) describes a debate in the senate in the Temple of Fides which the *pontifex maximus*, Scipio Nasica, left with his toga wrapped around his head and gathering followers as he marched towards Gracchus' assembly. When they arrived (at a different temple) the group

scelus, anhelans ex infimo pectore crudelitatem, contorquet brachium et dubitanti Gracco quid esset neque tamen locum in quo constiterat relinquenti percutit tempus. Ille, nulla voce delibans insitam virtutem, concidit tacitus. Iste viri fortissimi miserando sanguine aspersus, quasi facinus praeclarissimum fecisset circum inspectans et hilare sceleratum gratulantibus manum porrigens, in templum Iovis contulit sese.

⁹ *Rhet. Her.* 4.55.68.

¹⁰ See now Webb (2009) on *ekphrasis* and its persuasive power.

¹¹ Gell. *NA* 2.13.5.

attacked and pursued the Gracchan crowd, killing many, including Gracchus.¹² Plutarch's account has many of the same details as the account of Velleius Paterculus who sets the scene more generally on the Capitol.¹³

There are certainly similarities between the later accounts and the Auctor's. Indeed, at over 150 words, his *exemplum* is not so different in length to the most detailed descriptions found in the later Greek authors, Appian (c.300 words) and Plutarch (c.400 words). In the *Rhetorica ad Herennium*, as elsewhere, Gracchus is speaking at a *contio*, his killer emerges from a temple, and he dies after being struck by part of a bench or seat. Although Scipio Nasica is not named by the Auctor, there seems to be a connection between the killer's 'twisted' toga and the strange manner in which Scipio Nasica arranged his toga in later sources, which Appian finds difficult to explain.¹⁴

However, there is a clear difference between the perspective of the Auctor's *exemplum* and the later sources, which tend to prioritise the debate in the senate and then move with Scipio Nasica towards the scene of the murder. By contrast, in this *exemplum* the reader sees events from Gracchus' perspective, who is unaware of the imminent attack. Rather than fleeing from Scipio Nasica and his followers (who come from the Temple of Jupiter this time), the Auctor's Gracchus stays still through shock (and 'deep-rooted virtue'). Unlike in the other sources, this *exemplum* makes Gracchus' death purposeful and personal, a clash between two individuals, rather than a confused pursuit and death amongst the crowd. The crowd flee and Gracchus 'the very bravest soul' is left to die alone. The *exemplum* ends neatly without the confusion implicit in the later accounts (including Gracchus' body being thrown into the Tiber): job done, and covered with blood, the killer returns to the temple.

The language and approach of the Auctor's *exemplum* is unambiguous. He uses emotive language to draw a clear contrast between the murderous assassin and the brave hero, Gracchus. At the same time, the length of the *exemplum* gives the Auctor the opportunity to illustrate the relevant rhetorical technique, *demonstratio*. The choice of this final

¹² App. *B Civ.* 1.15-6.

¹³ Plut. *Ti Gracch.* 17.5-19; Vell. Pat. 2.3.1-2. Cf. Livy *Per.* 58; Val. Max. 3.2.17; Plut. *C Gracch.* 3.3-4.

¹⁴ App. *B Civ.* 1.16.

exemplum seems so significant that it cannot be ignored and in fact speaks for the Auctor's methodology throughout the text. As elsewhere, the need to illustrate rhetorical techniques informs the Auctor's choice of an important and even controversial *exemplum*.

The Auctor's own considerable investment in the *exempla* is shown in the preface to Book 4, a well-known and important section of the *Rhetorica ad Herennium*. The Auctor says clearly that he has used his own examples and must justify this departure from the traditional approach.¹⁵ In the lengthy discussion that follows he argues against the practice of his predecessors who used *exempla* from other writers for several reasons: their own modesty; to reinforce their point as *testimonia*; to add greater authority to their work; and because it is a sign of the 'utmost skill' (*summum artificium*).¹⁶

But the Auctor argues that there is no skill in selecting *exempla* from a large number of works: it is merely time-consuming. In fact, all these reasons are disingenuous or mistaken according to the Auctor. The Greek authors are not modest; why would they write at all if they were? Additionally, their points do not need reinforcing with *testimonia*, but rather clarifying with *exempla*. However, they cannot gain authority from borrowing *exempla* because they use examples from authors who do not know about rhetoric. If *exempla* have to be borrowed, the Auctor thinks they should all come from a single source, in order for the student to understand that all the necessary skills can be obtained by a single individual. Despite this caveat, the Auctor's opinion is that borrowing *exempla* is not ideal: a teacher of rhetorical theory should write his own examples, partly to demonstrate his own ability and the practical nature of his advice, but also to ensure that the examples are suited to the task: 'it is necessary to cite *exempla* that have been composed for the express purpose that they fit into the theoretical system'.¹⁷

However, despite these claims, the Auctor does not invent all of his examples himself and this is not only evident where he is discussing faults, when he admits to using *exempla* from elsewhere.¹⁸ This has often puzzled commentators, but a likely explanation is that the

¹⁵ *Rhet. Her.* 4.1.1.

¹⁶ *Rhet. Her.* 4.1.1-2.3.

¹⁷ *Rhet. Her.* 4.7.10: *expresse conscripta ponere oportet exempla uti in artis formam convenire possint.*

¹⁸ *Rhet. Her.* 2.20.31, 4.12.18.

Auctor's adaptation of many of the examples from Greek sources to a Roman context was, for him, invention enough¹⁹ Otherwise, a translated quote from Homer in Book 4 would surely have exposed the Auctor to his audience.²⁰ Despite being unreferenced, this quote was well known and popular in antiquity,²¹ and would have carried its own authority; it would not have passed as the Auctor's own *exemplum*. Nevertheless, the Auctor must have considered how to adapt the *exempla* to be relevant and appropriate.

Still, according to his preface, the *exempla* in the *Rhetorica ad Herennium* originated with the Auctor to some degree. As he says in conclusion:²²

The remainder of the text will be taken up by *exempla*. If I had cited these *exempla* from others, it would have made it so that whatever was at all advantageous in this book would not have been mine, and whatever was rather crude and unusual would be attributed to me. Therefore I also escape this disadvantage.

The Auctor clearly views the *exempla* as a significant part of Book 4, where they are clustered, and he claims to be responsible for them. He takes ownership of the *exempla* and is aware that he will be judged on what they add to the text. Although the Auctor does focus on the practical side of *exempla* as tools for rhetorical students in this preface, the implication is that he has taken care to choose and deploy the right *exempla* in the text to get his meaning across. As such, it is unlikely that their additional significance for the reader would have escaped his notice.

Defining *exempla*

Each time the Auctor defines or illustrates the *exemplum* itself, he acknowledges that it is not just a teaching tool. In the preface, the Auctor first argues that *exempla* should

¹⁹ Caplan (1954) xxxii: 'he may have considered his free translation of the Greek examples and alteration of the Latin a large enough task to justify his feeling that they were now his own... The claim to originality becomes then a pardonable, or at least an understandable, exaggeration, rather than evidence of misrepresentation'.

²⁰ *Rhet. Her.* 4.33.44 = *Hom. Il.* 1.249.

²¹ See Caplan (1954) *ad loc.* Cf. Calboli (1969) 46-50 who argues that the Auctor also adapted some of his *exempla* to a greater degree than Marx allows.

²² *Rhet. Her.* 4.7.10: *Reliquum scripturae consumetur in exemplis; haec aliena si posuissemus, factum esset ut quod commodius esset in hoc libro id nostrum non esset, quod asperius et inusitatus id proprie nobis adtribueretur. Ergo hanc quoque incommodatam fugimus.*

primarily be used for demonstrating a point, rather than proving or giving evidence for it.²³ By making this distinction, the Auctor departs from the Greek practice of using *exempla* to prove an argument, which K. Demoen calls the *exemplum probationis*.²⁴ J.-M. David also concludes that the main purpose of an *exemplum* is *probare* (to prove) or *movere* (to move).²⁵ Yet, by contrast, the Auctor brings the ‘ornamental function’ of *exempla* to the fore here as Demoen notes.²⁶ This suggests a different and developing idea of how the example would contribute to rhetorical persuasion and argument.²⁷

The Auctor follows this positive description with a negative one: *exempla* are not, ‘like *testimonia*, to be taken from the most famous men’ (*ut testimonia ab hominibus probatissimis sumi*) despite what others say.²⁸ He even goes on to give an example of how the envisaged example-giving should work: when speaking about Refinement (*exornatio*) arising from the similar endings of words, he could take this *exemplum*: *quibus possumus et debemus* ([to] whom we can and ought’) because all the words end with the same sound, ‘-us’.²⁹ What is interesting about this quote is that, as the Auctor acknowledges, it is taken from Crassus (*a Crasso*), the famous orator and statesman who had died only a few years previously in 91 BCE. In this case, the Auctor seems to have deliberately chosen and referenced a quote from a famous orator, to prove his point that this *exemplum* is not a *testimonium* despite its origin.

The use of Crassus in particular seems significant: his exemplary status was established a couple of paragraphs previously when he was mentioned as an orator others would strive to emulate.³⁰ In fact, he is the most frequently referenced and/or identifiable orator within the text.³¹ By invoking Crassus at this point, then, the Auctor complicates the argument he

²³ *Rhet. Her.* 4.3.5.

²⁴ Demoen (1997) 130-2.

²⁵ David (1980b) 85.

²⁶ Demoen (1997) 132.

²⁷ van der Poel (2009) 335 traces this ‘discussion’ further, to Cicero’s *Topica* and later Quintilian.

²⁸ *Rhet. Her.* 4.3.5.

²⁹ The *exemplum* is from Crassus’ speech in support of Quintus Servilius Caepio (the Elder)’s law to take judicial powers from the *equites*, quoted more fully in Cic. *De or.* 1.52.225. At this point in the speech he is arguing that the senators should not serve ‘anyone except the whole body of you, whom we can and ought’ (*nolite sinere nos cuiquam servire, nisi vobis universis, quibus et possumus debemus*).

³⁰ *Rhet. Her.* 4.2.2.

³¹ As discussed in Chapter 1: Crassus is named three times by the Auctor (*Rhet. Her.* 4.2.2, 4.3.5, 4.5.7). The Auctor quotes from his speech in defence of a Vestal Virgin in 114/113 BCE (*Rhet. Her.* 4.35.47) and adapts his speech opposing Marcus Iunius Brutus c.91 BCE (*Rhet. Her.* 4.13.19). It is conjectured that two further *exempla* (*Rhet. Her.* 4.22.30, 4.53.67) are also quotes from him.

is trying to present. Although the quote might first and foremost be, as he claims, intended to ‘demonstrate’ or ‘clarify’ a particular case, it is also explicitly associated with Crassus, who has already been used as an *exemplum*. What this shows is that an *exemplum* illustrating a rhetorical technique, in this case *exornatio*, could also function as a reference to a famous figure’s past words or deeds and gain authority from them (as this *exemplum* gains authority from Crassus himself). Unlike the *testimonium*, this is not their only function; the Auctor implicitly acknowledges their potential duality.

Another negative definition of *exemplum* features earlier, in Book 2, and appears as part of a list of faults, which typically begin with ‘*x vitiosum est*’. Here the Auctor says that the *exemplum* is faulty if it is false (because it can be argued against) or improper (because it should not be imitated) or either greater or less than the subject demands.³² Converting these into positive statements implies that the Auctor considers a functioning *exemplum* to be true and relevant to the matter in hand. Furthermore, in the wider social context, it must also be worthy of imitation.

The longest treatment of what an *exemplum* is, according to the Auctor, is found in the main body of Book 4. As well as being a feature of the Auctor’s handbook, he recommends using the *exemplum* as a rhetorical technique; there is an overlap between the way the Auctor instructs his reader and the way an orator would instruct or persuade his listener. Here the Auctor defines an *exemplum* as the presentation of something done or said in the past with the name of its securely attributed author (or ‘authority’).³³ The requirement to associate an *exemplum* with a specific individual reflects the Auctor’s use of Crassus in the preface and emphasises the importance of who said what. The context of the Auctor’s politically charged *exempla* is not irrelevant.

In order to find out how an *exemplum* works as a rhetorical technique, the Auctor directs the reader back to his discussion of Comparison (*similitudo*), where he says *exempla* are used ‘to embellish or prove or speak more clearly or place before the eyes’.³⁴ He clarifies

³² *Rhet. Her.* 2.29.46: *Exemplum vitiosum est si aut falsum est ut reprehendatur, aut improbum ut non sit imitandum, aut maius aut minus quam res postulat.*

³³ *Rhet. Her.* 4.49.62: *Exemplum est alicuius facti aut dicti praeteriti cum certi auctoris nomine propositio.*

³⁴ *Rhet. Her.* 4.45.59: *aut ornandi causa aut probandi aut apertius dicendi aut ante oculos ponendi.*

these functions of the *exemplum* further with a series of comparatives: it can make things *ornatior* ('more magnificent'), *apertior* ('clearer'), and *probabilior* ('more credible').³⁵ As in the *exemplum* of Tiberius Gracchus' murder, the Auctor again emphasises that the *exemplum* 'places before the eyes' (*ante oculos ponit*), bringing the subject to life for the audience.³⁶ Again, the Auctor gives a range of uses here that do not all point in the same direction; these aspects of the technique are done with different motivations and have different effects on the reader or listener.

In fact, by giving the *exemplum* this wide scope that encompasses the same motives (*causae*) as the Comparison, the Auctor contradicts his earlier definition. Whereas in the preface he makes a distinction between the use of the *testimonium* to prove (*probare*) and the *exemplum* to demonstrate (*demonstrare*), here he uses *probare* and *probabilior* (from the same root) for the *exemplum* too.

This imprecision in the language the Auctor uses and the lack of *causae* (motives) attributed specifically to *exempla* suggests that the discourse around how *exempla* functioned and should be used was not well established. This is also implied by the Auctor's willingness and ability to challenge the exemplary practice of past rhetoricians in his preface. *Exempla* had perhaps not received a great deal of scholarly or theoretical attention and might be a relatively recent development. At the same time, it seems that they are already an important feature of persuasion and communication in Roman discourse. The Auctor concludes the section on the *exemplum* by expressing his concern about saying too little (*pauca*) for the technique to be understood or too much (*plura*) after it had already been grasped; the brevity of the description suggests 'too much' was more likely and he expected the technique to be quickly understood.

The brevity of his description is compounded by his decision not to illustrate the *exemplum* directly. Almost all of the rhetorical techniques treated in Book 4 are clarified by at least one *exemplum*, but for the *exemplum* itself the reader is told to turn back to the explanation of Refining (*expolitio*) to see it in practice.³⁷ This seems to support the equivalence of the

³⁵ *Rhet. Her.* 4.49.62.

³⁶ *Rhet. Her.* 4.49.62.

³⁷ *Rhet. Her.* 4.43.56-44.57.

exemplum in each of the Auctor's usages: it stands to reason that an *exemplum* cannot illustrate an *exemplum* in and of itself. Rather, there must be a context.

The key statement of the treatment of Refining is 'a wise man will avoid no danger on behalf of the state',³⁸ which the Auctor illustrates in seven parts. The penultimate part is the argument from *exemplum*, which focuses on Publius Decius Mus.³⁹ In this case, then, the *exemplum* of Decius (an *exemplum* of *exemplum*, in fact) appears within a larger *exemplum*, which makes up the whole treatment of Refining. As this part of the *exemplum* outlines, Decius Mus gave his life in battle (in 295 BCE), throwing himself into the midst of the enemy in order to secure the Roman victory against the Samnites:⁴⁰

For many people escape a shipwreck unharmed, but no one can swim away safe from the shipwreck of the fatherland. I think that Decius knew this well, who is said to have dedicated his life to the gods and thrown himself into the middle of the enemy for the sake of his soldiers. He lost his life, but he did not waste it. For a very small, insignificant price he bought something much greater and indisputable. He gave his life, but he received the fatherland. He lost his life, but he gained glory, which shines more brightly every day as it is handed down through time with the highest praise.

By making reference to Decius Mus, the *exemplum* encourages the audience to imitate his patriotic behaviour. In this case, the person, behaviour and historicity of Decius Mus contribute to the success of the *exemplum* by giving it moral authority, *auctoritas*. The *exemplum* clearly fits into the category of 'historical *exemplum*' as van der Blom defines it:

A specific reference to an individual, a group of individuals, or an event in the past which is intended to serve as a moral-didactic guide to conduct.⁴¹

It is known from Livy that Decius Mus was from a successful plebeian *gens* and his father was also notable for a similar self-sacrifice on the battlefield, an *exemplum* which Decius Mus the son may have been emulating.⁴² He was elected consul four times, as well as censor, the highest offices in Rome. He acted with wisdom, as the Auctor implies, but also

³⁸ *Rhet. Her.* 4.44.57: *sapiens nullum pro re publica periculum vitabit.*

³⁹ Also discussed in Litchfield's classic study of *exempla virtutis*: (1914) 46-8. Roller (2004) for other early Roman *exempla*, Horatius Cocles and Cloelia.

⁴⁰ *Rhet. Her.* 4.44.57: *Navi enim fracta multi incolumes evaserunt; ex naufragio patriae salvus nemo potest enatare. Quod mihi bene videtur Decius intellexisse, qui se devovisse dicitur et pro legionibus in hostis inmisisse medios. Amisit vitam, at non perdidit. Re enim vilissima certam et parva maximam redemit. Vitam dedit, accepit patriam; amisit animam, potitus est gloriam, quae cum summa laude prodita vetustate cottidie magis enitescit.*

⁴¹ van der Blom (2010) 68.

⁴² See Livy's account of Decius Mus' death (10.28) and of his father (8.9-10).

showed his loyalty to the state. Lastly, he was a figure from the distant past and so personified the authority of traditional behaviours or *mos maiorum*.⁴³ The *exemplum* can act as shorthand for conjuring these authoritative associations in the audience without having to discuss them in detail. This is translated into persuasive force through the relevance of the interpretation given by the speaker. In this application of his definition, then, the Auctor shows his awareness of the ways in which *exempla* operate.

The Auctor's use of this *exemplum* also fits into the way scholars understand the *exempla* to work in theory, using the concepts of the particular and the general or universal.⁴⁴ K. Stierle, in his comparison between the fable and the example, argues that the example 'implies' the general: in the example the general appears '*within* the particular'.⁴⁵ This means that an *exemplum* (the particular) can and should be extrapolated, compared, and applied to the (general) situation in hand,⁴⁶ whether by the speaker or (if the *exemplum* is well chosen)⁴⁷ the audience, in order to draw the necessary parallels. This potential is made particularly clear in the Auctor's *exemplum* of Refining through the relationship between the key statement ('a wise man will avoid no danger on behalf of the state') and Decius Mus' actions. Thus the *exemplum* becomes a guideline, or pattern,⁴⁸ by which, it is suggested, the audience should judge.

The fact that the Auctor defines *exempla* three times within the *Rhetorica ad Herennium* is itself a sign that he sees *exempla* as having a range of uses. From a didactic tool to a rhetorical technique, *exempla* bring arguments and contexts to life so that audiences can understand and reapply them. But *exempla* do not come about by chance; they must be carefully chosen and crafted. For this reason, the Auctor's *exempla* are significant and must be interpreted as part of his overarching programme for the *Rhetorica ad Herennium*. Of course, the Auctor is departing from the Greek tradition in another way, too: by writing

⁴³ Much has been written about the Roman (*exempla* and) *mos maiorum*, for example, David (1980b); Bettini (2000); Haltenhoff (2001); Hölkeskamp (2004); Pina Polo (2004); van der Blom (2010).

⁴⁴ See e.g. Brinton (1988) 182; Arthos (2003).

⁴⁵ Stierle (1972) 182. By contrast, the fable represents the general '*in the form of* the particular'. See also Gelley (1995) 7: this shift between the particular and the universal requires the audience 'to *think* a universal we can never *know*'; the universal or general can only be understood as a series of particulars, hence the audience must make and accept a conceptual leap to appreciate the functionality of the *exemplum*.

⁴⁶ Stierle (1972) 183.

⁴⁷ Brinton (1988) 180.

⁴⁸ Arthos (2003) 338.

in Latin. In the next section, I will discuss where the Auctor's Latin and Roman *exempla* could come from and whose example (or examples) he might be following.

Where do the *exempla* come from?

As seen above, the Auctor did not write all the *exempla* in the *Rhetorica ad Herennium* himself, despite his claims in the preface to Book 4. Nevertheless, in keeping with this claim, he does not give sources for many of his *exempla*, but seems to have taken them from different places and adapted them to a greater or lesser degree. In this section I will discuss further how an *exemplum* is created and transmitted, and where the Auctor's own *exempla* originate.

In the *exemplum* of Decius Mus, the Auctor has already given an indication of how someone or something becomes an *exemplum* in Rome. Decius Mus exchanged his life for glory, and this glory increases as his story is 'handed down' (*prodire*) with praise. This handing down or retelling is the key; as van der Blom argues, the actual creation of *exempla* only requires a speaker or writer simply to present an individual or event as an *exemplum*.⁴⁹ K.-J. Hölkeskamp also argues that all *res gestae* ('things done') are at least 'potential *exempla*',⁵⁰ an idea reflected in F. Bücher's description of Rome as an '*exempla-Fabrik*' (*exempla* factory).⁵¹ But Hölkeskamp suggests that in order to be worthy of becoming an *exemplum* the action, event or individual must be both formative (a model worthy and demanding of imitation in the future) and normative (representative of commonly shared norms, values, and virtues).⁵² For various reasons, the *exempla* of the *Rhetorica ad Herennium* have beaten off the competition of other events or important occurrences in the Roman past to become exemplary and should be recognised as important for this reason.

⁴⁹ van der Blom (2010) 78.

⁵⁰ Hölkeskamp (2004) 180.

⁵¹ Bücher (2006) 329.

⁵² Hölkeskamp (2004) 170, 180, 183. See Kaplow (2012) for the negative parallel to this in the case of '*popularis* history'.

As with Decius Mus, these *exempla* are part of Roman society's collective memory which is transmitted through the generations. The concept of the collective memory (*mémoire collective/kollektiv Gedächtnis*) looks back to the work of M. Halbwachs and has been influential in the understanding of the social and historical context of *exempla* in recent years. For Halbwachs, memories are 'models, examples, and elements of teaching'; hence examples are a key part of the collective memory.⁵³ But it is also important that memories of the past, which are memories of a group's history, are also relative to that group's present condition and hence can change or be changed.⁵⁴

J. Assman also supposes the existence of a 'communicative memory', inclusive of Halbwachs' collective memory, which has no fixed temporal limits and works within the reach of oral history, around 80-100 years. Despite the potential for change, Assman suggests that in order to be transmitted, or transmittable, the content of communicative memory must be 'crystallised' through writing, imagery, and/or rituals.⁵⁵ By fixing them in the context of a (Latin) rhetorical handbook, the Auctor becomes part of this process of crystallisation that establishes *exempla* in the longer-term consciousness, taking the opportunity to promote his own interpretation(s) against other possible (competing) ideas.⁵⁶

In more concrete terms, however, it is not clear which sources the Auctor used to supply his *exempla* directly as he does not cite them. Although this is not surprising in one sense, as ancient authors rarely give references, it goes against his previous definition, which required that *exempla* include the name of their author.⁵⁷

It may be that the Auctor did take some of his *exempla*, or types of *exempla*, from recent Latin historical texts, as the fragmentary evidence suggests that the practice of including speeches and *exempla* in such works became increasingly popular among Roman authors throughout the second century BCE.

⁵³ Halbwachs (1992) 58.

⁵⁴ Halbwachs (1992) 81.

⁵⁵ Assman (1988) 10-11.

⁵⁶ Roller (1997) argues for the later role of declamation in 'producing' the history of Cicero's death.

⁵⁷ *Rhet. Her.* 4.49.62: *cum certi auctoris nomine* (see above).

The first recorded writer to do this in Latin was Cato the Elder, who included two of his own speeches in his *Origines* and other speeches were possibly published too (perhaps posthumously).⁵⁸ By placing speeches into his work, which was itself the first example of Latin historiography, Cato is both conforming to Greek models and setting a precedent for later writers in Latin.⁵⁹ It follows that Cato's practice of including his own speeches may have contributed to the Auctor's inclusion of examples that he also could have written himself, such as the styles of speech exemplified at the beginning of Book 4.⁶⁰ By presenting his material in this way, the Auctor is taking advantage of his audience's familiarity with speeches and their ability to understand and analyse them as written texts.

Although only fragments of second century history writing survive,⁶¹ there is evidence that speeches, conversations, and other oral pronouncements were being recorded by other Roman writers too. These may have set a precedent for the Auctor's selection of *exempla*.⁶² According to Livy, Gaius Acilius related a conversation between Scipio Africanus and Hannibal.⁶³ Similarly, Lucius Calpurnius Piso Frugi gives an account of Tarpeia's conversation with the Sabine king Tatius as well as Romulus' reply to his dinner hosts.⁶⁴ Lucius Cassius Hemina is quoted as giving the explanation of Gnaeus Terentius, excavator of Numa's chest.⁶⁵ Sempronius Asellio recorded Lucius Aemilius Paulus' advice for good generals, as heard by his son Scipio Africanus.⁶⁶ Lucius Piso Frugi also included speeches in his work, such as the words that Gaius Furius Cresimus spoke in his own defence in court,⁶⁷ and gave the incantation the chief priest should use to rekindle the everlasting flame of the Vestal Virgins.⁶⁸ Cicero records another particularly relevant case

⁵⁸ The two speeches are known as the *Pro Rhodiensibus* (FRHist 5.T12: Livy 45.25.3; Gell. 6.3.7) and *Contra Galbam* (FRHist 5.T12: Cic. *Brut.* 89). For Cato's writing see Astin (1978) 182-239; Gratwick (1982a); Sciarrino (2004), (2011) esp. Chapters 4 and 5. For a critical discussion about the survival of Cato's speeches, see Carawan (1990), cf. Cic. *Brut.* 65. Kennedy (1972) 38-60 for a general overview.

⁵⁹ Goldberg (2004) 21-2, cf. Gelzer (1934).

⁶⁰ *Rhet. Her.* 4.8.11-11.16. This approach to explaining the different styles of speaking is not paralleled by other surviving rhetorical treatises before or afterwards; both the idea and its implementation may be the Auctor's own. The choice to include lengthy *exempla* with only a small amount of commentary is a contrast to the more descriptive approach taken by Cicero and Quintilian in later works. Cic. *De or.* 3.45.177; Quint. *Inst.* 12.10.58.

⁶¹ For a brief overview see Gratwick (1982a) 149-52; see also Cornell (2013).

⁶² The fact that a rhetorical education would also be used for historical speech-writing makes this connection even closer.

⁶³ Livy 35.14.5-12 = FRHist 7.F4.

⁶⁴ DH 2.38.2-40.3 = FRHist 9.F7; Gell. 11.14 = FRHist 9.F10.

⁶⁵ Plin. *HN* 13.86 = FRHist 6.F35.

⁶⁶ Gell. *NA* 13.3.6 = FRHist 20.F6.

⁶⁷ Plin. *HN* 18.41-3 = FRHist 9.F35.

⁶⁸ Lydus *Mens.* Fr.6 (168) 179-80 = FRHist 9.F47.

in which Gaius Fannius included in his work a speech of Quintus Metellus,⁶⁹ known for his eloquence, against Tiberius Gracchus.⁷⁰ There are even examples of the speech of women recorded by these second century historians.⁷¹

Fragments suggest that Lucius Coelius Antipater also included direct speech.⁷² This is significant because Coelius Antipater is one of only two non-literary authors to be named in association with an *exemplum* (the other is Crassus in the preface to Book 4, as discussed above).⁷³ Coelius Antipater is named again in a similar anecdote that appears in Cicero's *Orator*, another rhetorical work that was written around 40 years later.⁷⁴ This might mean that naming Coelius Antipater was a convention of rhetorical treatises, but it also suggests that the Auctor was at least vaguely familiar with his work.

Lucilius is another Roman author named in the *Rhetorica ad Herennium* who uses direct speech in his *Satires* to give voice to the characters of his works, such as his Scaevola, as quoted by Cicero in *De Finibus*.⁷⁵ Again, the reference to Lucilius in an *exemplum* suggests the Auctor's awareness of his work, particularly given the context of a rather ironic prosecution for *iniuria*.⁷⁶

The inclusion of such quotes in Latin texts after Cato shows that the transcription of the spoken word became a significant feature. Their subject matter and origins also bear a resemblance to the sorts of topics discussed in the *exempla* of the *Rhetorica ad Herennium*, which are similarly drawn from a mix of private, public and legal contexts. The influence of recent Roman history and historiography, written in Latin, can therefore be seen in the broader exemplary content of the *Rhetorica ad Herennium*.

⁶⁹ Cic. *Brut.* 81.

⁷⁰ FRHist 12.T2.

⁷¹ Hersilia in the *Annales* of Gnaeus Gellius (Gell. *NA* 13.23.13 = FRHist 14.F5).

⁷² Prisc. *GL* 2.510 = FRHist 15.F5; Charis. 281 = 15.F18; Prisc. *GL* 2.198 = 15.F24

⁷³ *Rhet. Her.* 4.12.18: *quo in vitio est Coelius adsiduus...* ('Coelius is persistent in this fault...').

⁷⁴ Cic. *Orat.* 69.203.

⁷⁵ Cic. *Fin.* 1.3.8.

⁷⁶ See *Rhet. Her.* 2.13.19.

When *exempla* can be identified, it is possible to trace the direct influence of Roman authors and orators. It is only when quoting literary authors that the Auctor more regularly names his sources. For example, Pacuvius is named once out of two possible identified quotes, Ennius twice (out of six), and Plautus once (out of two). Two other *exempla* quoted from Ennius are also signposted as being from an external source.⁷⁷ The Auctor may have been influenced in the use of these authors, as the same literary quotations are also found cited and referenced in Cicero's *De Inventione* and as such may be part of the rhetorical tradition.⁷⁸

Other *exempla* are harder to identify, but may come from speeches or even conversations that the Auctor heard. The quote 'no one can fall in love at first sight or in passing',⁷⁹ has been identified by modern commentators using evidence from the *De Inventione* where Cicero says that Curio is the author.⁸⁰ Although unattributed in the *Rhetorica ad Herennium*, this confirms that it is taken from Gaius Scribonius Curio's speech in defence of Servius Fulvius against a charge of incest.⁸¹ It is possible, perhaps likely, that many of the other *exempla* in the *Rhetorica ad Herennium* are from comparable sorts of speeches that originate in Rome but remain unidentified.

One such case is the mention of Lucius Labeo, who is named in the *exemplum* of Paraleipsis (*occultatio*).⁸² He may have been an important figure at one time, but there is no surviving evidence to conjecture either way. This is particularly frustrating given the rarity of other named figures in the text. For this and other such *exempla* it is hard to know whether or not they were recognisable to the more aware Roman audience, but if so this *exemplum* would have been all the more meaningful.⁸³

⁷⁷ Both at *Rhet. Her.* 4.12.18: the Auctor argues that it is acceptable to use *aliena exempla* when describing faults (*vitia*).

⁷⁸ As with the reference to L. Coelius Antipater above.

⁷⁹ *Rhet. Her.* 2.20.33.

⁸⁰ *Cic. Inv. rhet.* 1.43.80.

⁸¹ *TLRR* 44.

⁸² *Rhet. Her.* 4.27.37.

⁸³ See Morstein-Marx's discussion of audience knowledge: (2004) 68-118. van der Blom discusses the different ways that Cicero uses historical *exempla* in different genres of literary works. In his treatises, Cicero uses Greek *exempla*, mythical *exempla* and *exempla* from other authors more frequently than elsewhere: (2010) 128-44. It is also necessary to think about other genres, as in Gabba (1981); Wiseman (2009). Adamik (2007) is an interesting study of the possible influence of Atellane comedy on *Rhet. Her.* 4.50.63-51.65.

This question of audience knowledge is particularly acute when the Auctor gives only the name of an individual to stand as an *exemplum*.⁸⁴ The Auctor does this in the preface to Book 4 several times, in one case highlighting the enthusiasm that the hope of speaking as well as ‘a Gracchus or Crassus’ can evoke in people.⁸⁵ Here, Gracchus and Crassus are used to exemplify excellent orators. The brevity of these references has implications for the audience and for exemplary culture, as U. Walter argues, because these abbreviated references are only possible when the speaker and addressee have the same field of reference and awareness of the same *exempla*.⁸⁶ By referencing an individual in this way, the Auctor makes an assumption about the audience’s historical knowledge and understanding, which entails their ability to make the relevant connection and their likely agreement with the point being made: that Crassus and Gracchus were exceptional orators worthy of imitation.

To sum up, it is not possible to untangle why the Auctor did not name all his sources, but perhaps he was motivated by a desire to keep his text free of distracting famous names, or because some quotes are so recognisable that a reference would be superfluous. At the same time, ancient authors are often less concerned with referencing than modern scholars and it may be a reflection of the common practice of the time. Nevertheless it is tempting to see the influence of recent Roman historiographers in the Auctor’s use of *exempla*, either directly or indirectly. Some literary sources can be identified in the *Rhetorica ad Herennium* and other sources cannot, but it seems reasonable to assume that a Roman reader would recognise more of these *exempla* than a scholar can today. Whether they are just names or much longer inclusions, the Auctor uses *exempla* from sources and environments that his audience would recognise and in a way that would be familiar to them. In the next section I will examine the Auctor’s choice in greater detail by studying the content of his *exempla* in comparison with the *exempla* found in Cicero’s *De Inventione*.

How do Cicero’s *exempla* in *De Inventione* compare?

⁸⁴ Mencacci argues that a short *exemplum* or name-check such as this (which she terms a ‘reuse’, *riuso*) implies the existence of a more substantial and detailed *exemplum* (an ‘account’, *racconto*), which provides the context: (2001) 422. See also Hölkeskamp (2004) 178; Bücher (2006) 68.

⁸⁵ *Rhet. Her.* 4.1.2.

⁸⁶ Walter (2004) 52.

In order to put the Auctor's use of *exempla* into context, I will now examine the approach taken in Cicero's closely contemporaneous *De Inventione*. This comparison will confirm that, wherever the *exempla* come from, the Auctor has consciously chosen to deploy them in specific and significant ways. He uses *exempla* from a particular historical tradition about the recent past deliberately and distinctively suggesting that he viewed these events and the rhetoric employed as particularly important. By contrast, Cicero takes a different approach to *exempla*, distancing himself from contemporary events by referring largely to figures and situations from the distant past. In doing so, Cicero produces a work that is more impersonal and isolated than that of the Auctor, showing a different attitude towards his contemporary context. Comparing the two authors demonstrates the different exemplary traditions, different voices, and different perspectives available in the 80s BCE. This is an important reminder that neither author should be considered the norm.

The potential for differences between Cicero and the Auctor also highlights the flexibility of exemplary practice, which was neither monolithic nor timeless. As Walter highlights, there is little evidence for the use of *exempla* in the early period: fragments of Cato's speeches show historical knowledge but no *exempla per se*.⁸⁷ Although there is much more (Ciceronian) evidence for the late Republic, it must be the case that the changing political situation required different *exempla* and an altered application of *exempla* too.⁸⁸ Hence the evidence from the *Rhetorica ad Herennium* (and the *De Inventione*) can be very informative because the *exempla* and exemplary practice it describes are situated in, and written for, the political culture of the period before Sulla's dictatorship (82-81 BCE).

Cicero's definition of *exemplum* in *De Inventione* is somewhat different to the Auctor's in the *Rhetorica ad Herennium*.⁸⁹ Indeed, Stemmler notes that despite other similarities between Cicero's *De Inventione* and the *Rhetorica ad Herennium*, their definitions of *exemplum* are unusually different.⁹⁰ However there are some similar themes: Cicero says that 'an exemplum is what either strengthens or weakens a cause through the authority or

⁸⁷ Walter (2004) 60.

⁸⁸ Walter (2004) 60.

⁸⁹ Demoen (1997) compares definitions of the *exemplum* in ancient rhetorical theory.

⁹⁰ Stemmler (2000) 151.

circumstance of an individual or an event'.⁹¹ Despite their completely different wording, there is a similar focus in each text on a particular historical figure and the importance of their *auctoritas*, as paralleled by the *auctor* required in the Auctor's definition. However, for Cicero the *exemplum* is a subdivision of the rhetorical technique of Comparison, coming last in the definition after Simile (*imago*) and Parallel (*collatio*). By contrast, the *Rhetorica ad Herennium* makes *exemplum* a separate Figure of Speech, equally as important as Comparison and Simile. The emphasis placed on the *exemplum* in rhetorical argument is therefore slightly different, as the Auctor's arrangement seems to assign it a greater importance.

While the Auctor devotes time to developing his argument regarding *exempla*, which forms his preface to Book 4, Cicero instead presents the story of Zeuxis choosing five models from the fair maidens of Croton to stand for Helen of Troy.⁹² This policy of cherry-picking the best bits from each model is equivalent, Cicero says, to his policy of choosing *exempla* from other authors: he used their good ideas, and could ignore their bad ones.⁹³ As Cicero states explicitly, by choosing his *exempla* in this way he is following a tradition that goes back to Aristotle.⁹⁴ This is a method that the Auctor explicitly rejects in his preface as being misleading and discouraging to the student.⁹⁵ In contrast to Cicero, the Auctor is not just looking to present the 'best bits' from a whole array of sources, but instead argues that a teacher of rhetoric should use *exempla* to demonstrate his own knowledge. As above, this difference in approach suggests that the theory and discourse of exemplary culture were still being debated, at least in the relatively new discipline of rhetoric taught in the Latin language.

At the more detailed level of content, too, there is a significant difference in the subjects that Cicero and the Auctor use in their *exempla*. Often, they choose very different *exempla* to illustrate the same technique. However, in some cases the two authors do use the same *exempla*. As a comparison, I will examine the way corresponding *exempla* are presented in the *De Inventione* in order to interpret the *Rhetorica ad Herennium* within its

⁹¹ Cic. *Inv. rhet.* 1.30.49: *Exemplum est quod rem auctoritate aut casu alicuius hominis aut negotii confirmat aut infirmat.*

⁹² Cic. *Inv. rhet.* 2.1.1-3.

⁹³ Cic. *Inv. rhet.* 2.2.4-5.

⁹⁴ Cic. *Inv. rhet.* 2.2.6. For Aristotle's examples see in particular Hauser (1968), (1985); Benoit (1987); Hauser (1987).

⁹⁵ *Rhet. Her.* 4.5.7.

contemporary context.⁹⁶ I will also compare the presentation of different content within the *exempla* of the two works, to show that the authors use two different exemplary traditions derived from different perspectives.

Same topics, different approach to *exempla*

To look at the *exempla* in greater detail I will focus on three instances in particular: the Gracchi, the case of rebellion in Fregellae, and Gaius Popilius. These *exempla* appear in both texts, hence it will be profitable to look at the different ways in which Cicero and the Auctor present these *exempla*.

The Auctor refers to Tiberius and Gaius Gracchus in ten locations, some of which have been discussed already above. In one case a Gracchus is cited by the Auctor alongside Ennius as a source of *exempla* and then with Crassus as a skilled orator.⁹⁷ The Gracchi are also named as sources of *exempla* alongside Cato, Laelius, Scipio, Galba, Porcina, Crassus and Antonius.⁹⁸ Besides these positive but brief citations, seven other more detailed references are also supportive of the Gracchi; only two are ambiguous.⁹⁹ The supportive *exempla* speak of the ‘cruelty’ (*crudelitas*) of the enemies of the Gracchi, who remain ‘unavenged’ (*inulti*). Other *exempla* mention the ‘shocking murder’ (*indigna nex*) of Tiberius, treated in gruesome detail in the final *exemplum* of the whole work. The first of the two ambiguous references accuses Gaius Gracchus of planning riots, and the second

⁹⁶ There are many studies of different authors’ approaches to *exempla*, including Cicero, such as: Klotz (1909); Münzer (1920); Helm (1939); Béranger (1972); Panico (1980); Gotoff (1981); Hamblenne (1981); Hershbell (1997); Chaplin (2000); Grethlein (2006); van der Blom (2010); Langlands (2011).

⁹⁷ *Rhet. Her.* 4.1.2: *Etenim cum possimus ab Ennio sumere aut a Gracco ponere exemplum, videtur esse adrogantia illa relinquere et ad sua devenire* (‘For when we can cite an *exemplum* from Ennius or from Gracchus, it seems arrogant to ignore them and turn to our own’); *Rhet. Her.* 4.2.2: *Immo erigit omnium cupiditates et acuit industriam, cum spes iniecta est posse imitando Gracchi aut Crassi consequi facultatem* (‘Rather, everyone’s ambitions are roused and their determination intensified when the hope is instilled of being able to gain the skill of a Gracchus or Crassus through imitation’).

⁹⁸ *Rhet. Her.* 4.5.7: *Allatis igitur exemplis a Catone, a Gracchis, a Laelio, a Scipione, Galba, Porcina, Crasso Antonio, ceteris, item sumptis aliis a poetis et historiarum scriptoribus necesse erit eum, qui discet, putare ab omnibus omnia, ab uno pauca vix potuisse sumi* (‘Therefore, when *exempla* are cited from Cato, Gracchus, Laelius, Scipio, Galba, Porcina, Crassus, Antonius, and from the rest, and also some are taken from the other poets and history writers, then the learner will necessarily think that everything could be cited from among all of them, while only a few could come from one person’). For pre-Ciceronian oratory, see for example Calboli (1982); Burnand (2000) 198-235; Sciarrino (2007).

⁹⁹ Supportive: *Rhet. Her.* 4.15.22, 4.22.31, 4.34.46, 4.54.67, 4.55.68; ambiguous: *Rhet. Her.* 4.28.38, 4.31.42.

claims ‘but the grandsons of Africanus were not that kind’.¹⁰⁰ Although it is not necessary to read these two *exempla* negatively, perhaps that interpretation is the more natural. By contrast, the *De Inventione* only mentions the Gracchi twice, firstly in Cicero’s introduction where their rhetorical skill is praised.¹⁰¹ Secondly, however, they are described as the cause of ‘such turmoil’ (*tantae seditiones*) and ‘harm’ (*incommodum*): an unambiguously negative interpretation.¹⁰²

This brief comparison between the approach of the two authors to the Gracchi has already revealed some differences. The Auctor shows a much greater interest in the Gracchi; together they are the most frequently referenced historical figures in the *Rhetorica ad Herennium*. The Auctor also shows a generally positive attitude towards them, with a few reservations, by opposing the way they died and those who caused their deaths. His presentation suggests that he was against the violence and illegitimacy of these actions. Although he uses more ambivalent *exempla* about their behaviour whilst alive, this is far from the damning attitude expressed by Cicero’s second *exemplum*.

It is perhaps not surprising to find different views about the Gracchi in particular, as scholars have previously noted that their reputation is often manipulated. As van der Blom suggests in her analysis of the Gracchan *exempla*, they were used flexibly.¹⁰³ Bücher uses the example of the Gracchi to show how information about them was common property and could be deployed in different ways, at different times or by different people.¹⁰⁴ This potential allows their character and behaviour to be interpreted and re-interpreted to avoid becoming out-dated.¹⁰⁵ It also means that they can be used to support opposing perspectives, as in the *Rhetorica ad Herennium* and the *De Inventione*.

¹⁰⁰ *Rhet. Her.* 4.28.38, 4.31.42: *At non Africani nepotes istiusmodi fuerunt.*

¹⁰¹ *Cic. Inv. rhet.* 1.4.5.

¹⁰² *Cic. Inv. rhet.* 1.49.91. The Gracchi are also cited by Cicero as pupils of Cato, Laelius and Africanus, and grouped with them as examples of ‘the highest virtue’ (*summa virtus*: *Cic. Inv. rhet.* 1.4.5). The father of the Gracchi also appears in an *exemplum* (*Cic. Inv. rhet.* 1.30.48).

¹⁰³ van der Blom (2010) 105.

¹⁰⁴ Bücher (2006) 323-4 and (2009).

¹⁰⁵ Stemmler (2000) 149, (2001) 238; Bücher (2006) 324-5.

The revolt and destruction of Fregellae took place in 125 BCE and is mentioned by the Auctor in three separate *exempla*, all within the final book on Style.¹⁰⁶ The most significant of these for our interpretation of Fregellae is the first reference, where it functions explicitly as a historical *exemplum* in a passage illustrating the Auctor's Middle Style of Speech.¹⁰⁷ Caplan suggests that this *exemplum* might derive from a speech of, or imitating, Quintus Varius Hybrida when passing a law in 90 BCE to prosecute senators who encouraged the allies to rebel and fight in the on-going Social War.¹⁰⁸ The Fregellans are invoked towards the end of the passage as a counter-argument to the main line of thought, which is that the under-supplied Italian allies would have been unlikely to make war on Rome without encouragement. It is suggested that someone will ask: "but did the Fregellans not attempt it for their own sake?" and the imagined reply:¹⁰⁹

They would attempt it much less lightly, because they saw how the Fregellans had come out of it. For those who are inexperienced in such matters, who cannot find *exempla* of each and every thing from what has been done previously, are very easily led into danger by their own lack of foresight. But those who know what has happened to others can easily prepare their own plans from the results of other situations.

This passage suggests that the defeated rebellion at Fregellae ought not to be repeated or imitated; Fregellae functions as a negative *exemplum* here: it would be profitable to learn from their mistakes.

This is the theme of the two other *exempla* as well, where it is emphasised that the former brilliance (*nitor, inlustravit*) of 'treacherous' (*perfidiosae*) Fregellae was destroyed by their own crime (*scelere vestro*),¹¹⁰ and despite their 'alliance' (*societas*) with Rome, they were overthrown.¹¹¹ There is a sense of regret here, but also inevitability; Fregellae is semantically linked in this final example with Numantia, Corinth and Carthage. Hence Fregellae is associated with three of Rome's greatest enemies and, simultaneously, its defeat is linked to (some of) Rome's greatest military victories. The implication of these *exempla* is the Auctor's disapproval of Fregellae's actions, but at the same time a clear

¹⁰⁶ *Rhet. Her.* 4.9.13, 4.15.22, 4.27.37.

¹⁰⁷ See discussion of *iudices* in Chapter 5.

¹⁰⁸ See Gruen (1965a).

¹⁰⁹ *Rhet. Her.* 4.9.13: *Quaeret aliquis: 'Quid? Fregellani non sua sponte conati sunt?' Eo quidem isti minus facile conarentur, quod illi quemadmodum discessissent videbant. Nam rerum inperiti, qui unius cuiusque rei de rebus ante gestis exempla petere non possunt, ii per imprudentiam facillime deducuntur in fraudem; at ii qui sciunt quid aliis acciderit facile ex aliorum eventis suis rationibus possunt providere.*

¹¹⁰ *Rhet. Her.* 4.15.22.

¹¹¹ *Rhet. Her.* 4.27.37.

sense of how important he perceived this event to be, in the tradition of Carthage and Corinth.

In the *De Inventione* the Fregellan episode receives only passing reference. Cicero asks first whether the Fregellans are friendly to the Roman people.¹¹² Then there is a second, tangential reference when Cicero mentions a ‘long debate’ (*diu deliberatum est*) held before Lucius Opimius and his advisors (*consilium*) about Quintus Numitorius Pullus. Pullus (as Cicero does not appear to need to explain) betrayed Fregellae to Opimius during the rebellion.¹¹³ Cicero takes a very different perspective to that of the Auctor, prioritising the Roman senatorial perspective rather than the effect on Fregellae itself as the Auctor had done.

In the *Rhetorica ad Herennium* the rebellion is negative, but the potential counter-argument and the debate about Pullus in *De Inventione* implies an alternative interpretation. Forty years after it had happened, Fregellae’s rebellion had become an *exemplum* that could be used positively and negatively. It could also be used from different perspectives. Within the Auctor’s various *exempla* Fregellae is used not only for its stylistic or didactic suitability but because the rebellion and the community’s fate were a significant event in recent Italian history. Cicero, on the other hand, is interested only in the Roman response to the event.

Lastly, several *exempla* refer to Gaius Popilius’ agreement with the attacking Gauls in 107 BCE. Rather than lose everything, Popilius bargained with the enemy to save his army but give up their baggage. This event is mentioned twice in the *exempla* of the *Rhetorica ad Herennium* and once in the *De Inventione*.¹¹⁴ In the *Rhetorica ad Herennium*, the Auctor names Gaius Popilius and describes his situation in terms sympathetic to Popilius. The Auctor evokes Popilius’ point of view by saying ‘he believed it was better’ (*satius esse duxit*) to act the way he did. In the second reference, the Auctor takes this a step further and has ‘Popilius’ speaking in the first person, defending his own conduct against the

¹¹² Cic. *Inv. rhet.* 1.8.11.

¹¹³ Cic. *Inv. rhet.* 2.34.105.

¹¹⁴ *Rhet. Her.* 1.15.25, 4.24.34; Cic. *Inv. rhet.* 2.24.72.

charge of *maiestas*.¹¹⁵ At the end of the *exemplum* the Auctor makes his own position clear in his authorial voice:¹¹⁶

When used repeatedly this kind of Hypophora achieve the effect of showing that out of everything, nothing more advantageous than what was done could have been done.

This suggests that the Auctor is favourable to Popilius' plight and supports the action that he was obliged to take. From the Auctor's point of view, perhaps, soldiers are more valuable than baggage, and the preservation of individuals contributes to the *maiestas* of the state more than the alternative. By contrast, Cicero remains distanced from his reference to the event, expressing neither approval nor disapproval, as in the Fregellan *exemplum*.¹¹⁷

The differences between Cicero and the Auctor have a political significance. The Auctor uses the *exempla* as a platform from which to express largely positive views about the Gracchi, loyalty to Rome, and the debated concept of *maiestas*. On the other hand, Cicero's negative use of the Gracchi, lack of judgement about Popilius and his senate-orientated view of the Fregellan episode present an equally political but quite clearly divergent perspective.

Besides these three topics, overlaps in the *exempla* of the two authors only occur when the content is not controversial. *Exempla* that appear in both works are mythical (involving Orestes and Ajax),¹¹⁸ literary (quotes from Ennius, Pacuvius and Plautus),¹¹⁹ or references to earlier historical events and individuals (such as the Carthaginian wars and the

¹¹⁵ NB. The charge would not have been *maiestas*, as this happened before the passing of Saturninus' law in 103/100 creating the charge. See below for Cicero's similar error with regard to Flaminius, although see Bauman (1970) 16-33. I discuss *maiestas* further in Chapter 5.

¹¹⁶ *Rhet. Her.* 4.24.34: *Eiusmodi consequuntur identidem subiunctiones ut ex omnibus ostendi videatur nihil potius quam quod factum sit faciundum fuisse.*

¹¹⁷ *Cic. Inv. rhet.* 2.24.73: *Ex quo iudicatio nascitur: Cum omnes perituri milites essent, nisi ad hanc pactionem venissent, utrum satius fuerit amittere milites, an ad hanc condicionem venire?* ('From this comes the Point to Adjudicate: Since all the soldiers would have died if they had not entered into this agreement, was it better to lose the soldiers or come to terms?')

¹¹⁸ *Rhet. Her.* 1.9.18 and *Cic. Inv. rhet.* 1.8.11 (Ajax); *Rhet. Her.* 1.16.26 and *Cic. Inv. rhet.* 1.13.18 (Orestes).

¹¹⁹ *Rhet. Her.* 2.22.34 and *Cic. Inv. rhet.* 1.49.91 (Ennius *Medea*); *Rhet. Her.* 2.25.40 and *Cic. Inv. rhet.* 1.48.90 (Pacuvius *Medea*); *Rhet. Her.* 2.23.45 and *Cic. Inv. rhet.* 1.50.95 (Plautus *Trinummus* 1.2.1.1).

Scipios).¹²⁰ Both authors repeatedly refer to Orestes' murder of his mother and Ajax's death in the first few chapters of their works to establish key ground rules for rhetorical practice. In many cases, where the authors do use the same example it is to illustrate the same rhetorical technique, suggesting that the example was present in their common source and neither author thought it necessary to deviate. For example, the Prologue to Ennius' *Medea* is quoted in both works to illustrate a defective proposition.¹²¹ The only difference is that the Auctor quotes six lines more than Cicero, suggesting that Cicero's editorial concerns were about length rather than content in this case. Unlike their different interpretations of politicised *exempla*, the lack of political content here seems to mean that both authors were able to treat these *exempla* in a similar, neutral way.

Different topics, same rhetorical technique

Despite the overlaps in *exempla* mentioned above, it is much more common for the two authors to choose different historical *exempla* and legal precedents. Out of around seventy such *exempla* in the *De Inventione*, only eight also appear in the *Rhetorica ad Herennium*. This choice of different *exempla*, and their treatment of them, further demonstrates the divergence of the two exemplary traditions.

The difference between the Auctor's and Cicero's approach is evident when the two authors use contrasting *exempla* to illustrate the same rhetorical technique. For example, to illustrate the definition of *maiestas*, the Auctor uses the dispute between Quintus Servilius Caepio and Saturninus in the late 100s BCE, while Cicero gives the example of Gaius Flaminius, consul during the Second Punic War.¹²² Similarly, under the topic of Legal Issue, the Auctor cites a statute forbidding those convicted of extortion from addressing the assembly, which is the *lex Domitia de sacerdotiis* of 104 BCE.¹²³ On the same topic,

¹²⁰ *Rhet. Her.* 3.2.2, 3.5.8, 4.13.19, 4.14.20, 4.33.45, 4.53.66 and *Cic. Inv. rhet.* 1.8.11, 1.12.17, 1.71.39, 1.72.39, 2.57.17 (Carthage/Carthaginians/Carthaginian wars); *Rhet. Her.* 3.2.2, 4.13.19, 4.15.22, 4.25.34, 4.32.43 and *Cic. Inv. rhet.* 1.4.5, 1.49.51 (Scipios).

¹²¹ *Rhet. Her.* 2.22.34; *Cic. Inv. rhet.* 1.49.91.

¹²² *Cic. Inv. rhet.* 2.17.52.

¹²³ *Rhet. Her.* 1.11.20. *Cic. Leg. agr.* 2.16, 18, *Brut.* 1.5.3; *Asc. Corn.* 79-80C; *Vell. Pat.* 2.12.3; *Suet. Ner.* 2.1; *Dio Cass.* 37.37. See *MRR* 1.559, 562 n.5, 565 with *MRR Suppl.* 82-3 for probable dating to 104 BCE (following an emendation of Asconius rather than Velleius, who gives 103 BCE).

Cicero uses the conflicting laws on tyrannicide from the fourth century.¹²⁴ In both cases, then, Cicero chooses *exempla* that are far removed from contemporary life. In other cases too the Auctor tends to use recent Roman examples, while Cicero commonly uses Greek laws,¹²⁵ or even, in one case, an imaginary law.¹²⁶

When thinking about why Cicero may have done this, I agree with J. Harries, who has suggested that Cicero's approach may have been motivated by political diplomacy.¹²⁷ This diplomacy seems to have encouraged him to avoid the events and actors of the recent past. In support of this, it is worth noting that Cicero only references an event in the first century BCE twice, and he does not refer to the Social War at all.¹²⁸ In fact, the events from the first century that he does mention (Crassus' demand for a triumph in 95 BCE and the *causa Curiana* a couple of years later) both involve men he has personally known and been mentored by as a young man. In general, Cicero avoids the more politically controversial events of recent years in the *De Inventione*. Importantly, the Auctor's *exempla* show that this was not the only option for an author at the time, and that Cicero's choice was a conscious one.

Recent political events and figures in the *Rhetorica ad Herennium*

I will examine the Auctor's treatment of these more recent *exempla*, which do not appear in the *De Inventione*, to show their political concerns and explore why the Auctor may have chosen them. These *exempla* refer to Marius and the tribunes mentioned in association with the Gracchi, who also appear elsewhere: Saturninus, Drusus and Sulpicius. The events of the Social War are also referenced and will be discussed.

Marius' career is outlined in the penultimate *exemplum* of the text.¹²⁹

¹²⁴ Cic. *Inv. rhet.* 2.144-7.

¹²⁵ Three in a series: Cic. *Inv. rhet.* 2.31.95-2.32.98.

¹²⁶ Cic. *Inv. rhet.* 2.40.118.

¹²⁷ Harries (2006) 107.

¹²⁸ Crassus' demand for a triumph in 95 BCE: Cic. *Inv. rhet.* 2.37.111; the *causa Curiana*: Cic. *Inv. rhet.* 2.42.122.

¹²⁹ *Rhet. Her.* 4.54.68: *Modo consul quotannis, is deinde primus erat civitatis; tum proficiscitur in Asiam; deinde hostis et exul est dictus; post imperator septimo factus est consul.*

Recently a consul year on year, he was then the first man in the state. He then sets off for Asia, and then he was declared a public enemy and an exile. After he was named *imperator*, he was made consul for the seventh time.

Besides Marius' political importance in this period, his seventh consulship (and death shortly afterwards) is the latest event mentioned in the text, dated to 86 BCE. The description of his exile is brief, and the emphasis seems to be on Marius' pre-eminent political standing in the state instead; the word *consul* frames the *exemplum* at beginning and end. As with the powerful *exemplum* of Tiberius Gracchus' death, the position of this *exemplum* seems significant in combination with its political overtones and forces the reader to contemplate Marius' life and legacy.

Saturninus (*tr. pl.* 103, 100 BCE) is named in three *exempla* in the *Rhetorica ad Herennium* and is implicit in another. The first *exemplum* refers to his introduction of a grain law and the objections of Quintus Servilius Caepio that led to the latter's trial on the charge of *maiestas*, which is later detailed.¹³⁰ Caepio is presented as the obstructive force and violent language describes his 'attack', along with his colleagues from the senate, which had also decreed against Saturninus.¹³¹ The fact that it is Caepio who is put on trial suggests that Saturninus had strong support from contemporaries. The Auctor does give voice to Caepio's perspective, however, when he returns to the theme in Book 2.¹³² Later on, the Auctor uses *exempla* that are more obviously sympathetic to Saturninus, and he appears alongside the Gracchi in the roll call of wrongly murdered tribunes.¹³³

Other important characters from the recent period are also referenced such as Marcus Livius Drusus (*tr. pl.* 91 BCE) and Publius Sulpicius (*tr. pl.* 88 BCE),¹³⁴ who also appear in the *exemplum* associated with the Gracchi. Drusus does not appear elsewhere, but the sympathetic perspective of that *exemplum* extends into other references to Sulpicius. The first hypothesises about 'the man who confessed to killing Publius Sulpicius' (*qui Publium Sulpicium se fateatur occidisse*) being brought to trial. The second is critical of the way Sulpicius misrepresented his veto of a law that recalled people exiled without trial, but

¹³⁰ *Rhet. Her.* 1.12.21, cf. 2.12.17.

¹³¹ I quote this and the following *exempla* about the trial in full when discussing *maiestas* in Chapter 5.

¹³² *Rhet. Her.* 2.12.17.

¹³³ *Rhet. Her.* 4.22.31.

¹³⁴ Drusus: *Rhet. Her.* 4.34.46; Sulpicius: *Rhet. Her.* 1.15.25, 2.28.45, 4.22.31 (and cf. 4.14.20, 4.34.45 which might, according to Caplan [*ad loc.*], be part of a *controversia* about Sulpicius' murder).

finishes with a more understanding comment in the Auctor's authorial voice: 'True, we might forgive him if he did it for a reason'.¹³⁵

The boldness of this statement made by the Auctor should be acknowledged.¹³⁶ At this point in time, between 86-82 BCE, it would have been an undeniably significant statement to 'forgive' Sulpicius, an associate of Marius and enemy of Sulla at the time of his death in 88 BCE. The *fortasse* ('maybe', 'might') is the Auctor's only attempt to temper this strong testimony regarding very recent events and on-going political divisions. When understood in its temporal context, this seemingly throwaway comment is an important piece of evidence. It suggests that the Auctor was broadly supportive of the law Sulpicius was proposing, which supported the rights of individuals to a fair trial. This seems to be another case, like that of Popilius, where the Auctor prefers expediency and achieving results to what is ostensibly best practice. It also shows that the Auctor sees no contradiction in the criticism implied by this *exemplum* and the broad support shown to Sulpicius elsewhere in the text. As the *exempla* of the Gracchi implied, the Auctor does not have to consistently or wholeheartedly support an individual's past actions in order to sympathise and respect other aspects of their story in his *exempla*.

As already discussed in Chapter 1, several of the Auctor's historical *exempla* refer to the recent Social War (91-88 BCE).¹³⁷ In these *exempla*, the besieged Albensians and Pinnensian Vestini are considered worthy of great honour for their loyalty to Rome,¹³⁸ and the senate deliberates over granting citizenship to the allied communities (*socii*).¹³⁹ There is also the Auctor's *exemplum* of a speech in the Middle Style, if it represents Quintus Varius Hybrida's speech in 90 BCE.¹⁴⁰ What these *exempla* have in common is the idea of

¹³⁵ *Rhet. Her.* 2.28.45: *Verum illi fortasse ignoscimus, si cum causa fecit*. Gruen (1965a), Lintott (1971) and Powell (1990) are agreed that the exiles are unrelated to the *lex Varia* (contra Badian [1969]). Gruen (72-3) considers whether they were exiled under the *lex Licinia Mucia* or if they were *rhetoires Latini*, but seems unconvinced by either possibility. Lintott (433) suggests that the exiles were supporters of Saturninus. Powell (456-7) accepts that the exiles cannot be known, but argues that the event is not a sign of Sulpicius' inconsistency.

¹³⁶ For the atmosphere of the 90s BCE, Badian (1957); Gruen (1966a).

¹³⁷ *Rhet. Her.* 3.2.2.

¹³⁸ *Rhet. Her.* 2.28.45: *Quod genus, si quaeratur, utris maior honor habendus sit, Albensibus an Vestinis Pennensibus, quod rei publicae et populo Romano profuerint, et is, qui dicat, alteros laedat* ('For example, if it were asked who ought to be held in the greater honour for their assistance to the *res publica* and the Roman people, the Albensians or the Pennensian Vestini, and the speaker criticised one of them').

¹³⁹ *Rhet. Her.* 3.2.2.

¹⁴⁰ *Rhet. Her.* 4.9.13; see Caplan (1954) *ad loc.*

rewarding loyalty to Rome (with honour or citizenship) and punishing disloyalty (with exile).

The Auctor's use of these recent *exempla* is certainly different to Cicero, but it is not entirely unparalleled: the satirical writer Lucilius also wrote in a controversial way about recent events. Despite the difference in form between a rhetorical handbook and the verse *Satires*, Lucilius' mixture of historical, legal, and social commentary forms a comparable range of interests to those found in the *Rhetorica ad Herennium*. Lucilius makes references to the historic battles between Rome and Hannibal,¹⁴¹ as well as very recent disruptions of the late second century such as (perhaps) the destruction of Fregellae,¹⁴² and the Palantine War.¹⁴³ Lucilius also writes about social problems surrounding the price of corn,¹⁴⁴ as the Auctor does, as well as broader social commentaries about women, for example, that do not have a specific parallel in the *Rhetorica ad Herennium*.¹⁴⁵ Although later writers such as Apuleius still express their disapproval of Lucilius' practice,¹⁴⁶ it is possible that his approach to subject matter was influential for the Auctor's choice of *exempla*. In fact, Lucilius' subject matter did not cause him notable unpopularity: Gruen emphasises that Lucilius' reputation was such that he received a public funeral, and approval of his work grew in the years following his death.¹⁴⁷

Hölkeskamp suggests that the employment of *exempla* by orators in public speeches (whether in the law court, senate or *contio*) does not constitute *historia* or history writing.¹⁴⁸ Yet the different exemplary traditions illustrated by the Auctor in writing do seem to constitute an approach to history. The Auctor is actively engaged in debates about

¹⁴¹ E.g. *Rhet. Her.* 3.2.2; Lucil. 949-53. All references are to E. H. Warmington's 1938 Loeb edition of Lucilius fragments.

¹⁴² *Rhet. Her.* 4.9.13; Lucil. 1018.

¹⁴³ Lucil. 1123. Compare the Auctor's reference to the 'Italian' (Social) War: *Rhet. Her.* 3.2.2.

¹⁴⁴ Lucil. 214, 350-1, 538-9; *Rhet. Her.* 1.12.21.

¹⁴⁵ Although see *Rhet. Her.* 4.16.23, which is attributed to Cato by Quintilian. Other parallels with Lucilius' work include fragments that refer to laws against luxury (Lucil. 1238f) and against non-citizens (Lucil. 1017), which may have directly affected Lucilius (for luxury, *Rhet. Her.* 2.21.33; citizenship, *Rhet. Her.* 3.2.2; laws, e.g. *Rhet. Her.* 1.13.23). Just as the Auctor focuses on Judicial oratory and uses many *exempla* from forensic speeches, other fragments from Lucilius and even whole satires refer to legal contexts (Lucil. 64-5, 77, 80-81, 804-13, 863-4), such as what is now known as the first Satire in Book 1 describing the trial of Lucius Cornelius Lentulus Lupus by a council of the gods. The problem of an ambiguous inheritance is also mentioned by Lucilius (Lucil. 552-3, 554) as well as appearing early in the *Rhetorica ad Herennium* (1.12.20).

¹⁴⁶ Lucil. 308 (comments in Apuleius, *Apol.* 10).

¹⁴⁷ Gruen (1992) 273.

¹⁴⁸ Hölkeskamp (2004) 177.

the recent past and his strategic positioning of *exempla* draws the reader into those debates too. This contrasts with Cicero's approach of avoiding contentious issues and leaving questions open for the reader to decide. In contrast to Cicero, then, the Auctor's use of *exempla* shows a consistent interest in his own historical and contemporary context as something that informs his view of rhetoric and his relationship with his audience.

Conclusion

In this chapter, the importance of *exempla* has become clear. The utility of *exempla* for exploring how society formulated and reformulated memory and history, created consensus, and sustained debates makes the *Rhetorica ad Herennium* itself, full of such *exempla*, a highly informative text for studying this period.

Although in the past scholars have hesitated about interpreting the *exempla* as anything more than the building blocks of a rhetorical handbook, I have shown that the Auctor's own thoughts, situation, and experiences contributed to the choice and (in some sense) development of these *exempla*. The variety of *exempla* used in the *Rhetorica ad Herennium* were chosen and crafted by the Auctor for maximum effect.

It seems likely that the Auctor's use of Latin *exempla* was also informed by the practice of other writers who had begun to record speeches in their own work. Although some of the Auctor's *exempla* can be traced (particularly literary ones), the source of many more must remain unknown. However, it may be that they do come from speeches or figures familiar to the audience in Rome.

Other conclusions are more certain: both the *Rhetorica ad Herennium* and the *De Inventione* should be taken seriously as solid evidence of the political thought and debates of the time. As Cicero's work shows, not everyone in Roman Republican politics was comfortable entering the debate about recent political events. Some were, however, and

rhetorical handbooks like the *Rhetorica ad Herennium* meant that there were *exempla* and models for like-minded orators to use to perpetuate this trend and reach a wider audience.

The Auctor situates his text in this politically controversial period with much greater confidence and deliberateness than Cicero. As David noted, the use of *exempla* from the past implies the moral authority (*auctoritas*) of the writer or speaker and of the past itself;¹⁴⁹ those who used *exempla* could also gain *auctoritas* from them.¹⁵⁰ However, the ancestors and the people who spoke about them were usually members of the Roman elite, so it often appears that a single social group controlled the sources of history and *auctoritas*, such as speeches.¹⁵¹ Hence studying the *exempla* of the *Rhetorica ad Herennium* contributes to understanding how historical information was accessed and interpreted by those not directly involved in Roman politics and/or outside the Roman elite.

Following this, another result of the Auctor's use of contemporary and politically engaged *exempla* has been an on-going scholarly debate about the political leanings of the Auctor himself. In the next chapter I explore the extent to which the Auctor's *exempla* represent 'popularis' modes of speaking.

¹⁴⁹ David (1980a) 9. See van der Blom (2010) 124-8 for *auctoritas* and historical *exempla* in Cicero.

¹⁵⁰ Stemmler (2001) 230.

¹⁵¹ Pina Polo (2004) 161-3. See Wiseman (2008) and (2009) for the transmission of history by other social groups.

Chapter 4: *Popularis* oratory, invective and *licentia*

The Auctor's sympathy for murdered tribunes and the Italian allies has been taken to signify that he is a *popularis*, a supporter of 'popular' or people-pleasing political measures and the politicians who carried them out. Yet the term *popularis* is not used by the Auctor himself and is hard to define precisely, so it should be applied to the Auctor and his text with caution. It is true, however, that the Auctor presents certain modes of speech that reflect styles and on-going debates in the Roman Republic through his use of invective and his examples of *licentia* or Frankness of Speech. These examples are far from uncontroversial; in fact they represent direct attacks on groups and individuals made in the courts and *contiones*. Although I stop short of defining the Auctor as a *popularis*, I argue that the oratory promoted by the *Rhetorica ad Herennium* still pushes the boundaries of what is acceptable and challenges the status quo.

The analysis of previous chapters has brought out recurring themes, subjects and individuals that are of interest to the Auctor, such as the Gracchi, the murdered tribunes, the Italian allies and the situation surrounding the Social War.¹ The Auctor hypothesises how Publius Sulpicius' confessed murderer might reject the responsibility of the crime;² he quotes a warning to Saturninus that the Gracchi lie 'unavenged';³ and recalls the ups and downs of Marius' career in the text's penultimate *exemplum*.⁴ The Auctor's use of these and other examples seems to align him with a certain set of beliefs or even a political tradition. I have shown that this set of beliefs and the opinions he expresses directly or indirectly about them are very different to that of the young Cicero whose chosen *exempla* rarely reference recent political events.

It is due to these interests that the Auctor and his *exempla* have previously been described as *popularis* (pl. *populares*).⁵ In fact, the early commentator Marx went so far as to say that all those who promoted the study of Latin in the early first century BCE were from the

¹ See in particular Chapter 3. See also Gelzer (1962) and Ungern-Sternberg (1973) who discuss this issue specifically with reference to the *Rhetorica ad Herennium*.

² *Rhet. Her.* 1.15.25.

³ *Rhet. Her.* 4.52.67.

⁴ *Rhet. Her.* 4.52.68.

⁵ Marx (1894) 141-53; Achard (1989) xxiii-iv.

pars popularium ('party of the *populares*').⁶ Marx discusses the importance of the *exempla* that appear in the text, inferring from the Auctor's use of particular *exempla* that the Auctor was a *popularis*, part of a 'popular' party, which traced its political views back to the Gracchi and was allied to Gaius Marius.⁷ As discussed in the Introduction, the connection between Marius and the Auctor was a genuine possibility for Marx, through the Auctor's close relationship with the addressee of the work, Gaius Herennius, and possibly the Latin teacher Lucius Plotius Gallus.

Marx's view has been strongly supported and rejected for different reasons. Calboli argues in favour of Marx's original proposition, particularly supporting the connection to Marius and the Herennii.⁸ In the most recent commentary of the *Rhetorica ad Herennium*, Achard also sees the Auctor as 'very close to the Populists (*Populaires*).'⁹ However, Gelzer emphasises that the Auctor's supposed connections to Marius and Plotius Gallus are ill-founded and based on misunderstandings. Similarly, he refutes Marx's conception of the social and political make-up of the Roman state, which he argues could not support a 'democratic' party, as Marx suggests, or indeed 'parties' in any modern sense.¹⁰

Pragmatically, Caplan notes that despite there being several *exempla* where the Auctor does show sympathy for politically significant characters like the Gracchi, Saturninus, Drusus and Sulpicius, there are also instances where he uses *exempla* that express an opposing view, hostile to the 'popular mob'.¹¹ Calboli also conceded that there was an inconsistency between the Auctor's *exempla* and the *popularis* cause.¹²

However, this claim of 'inconsistency' highlights a problem. Although it is relatively easy to group together various Roman Republican politicians and ideas that seem, to modern scholars, to reflect a *popularis* tradition, it is less easy to be sure that this tradition reflects ancient thinking or even the (limited) ancient evidence. Is it possible to be sure that the

⁶ Marx (1894) 147.

⁷ Marx (1894) 141-53.

⁸ Calboli (1969) 35-41.

⁹ Achard (1989) xxviii.

¹⁰ Gelzer (1962) 212.

¹¹ Caplan (1954) xxii-iv. See also the analysis of Sinclair (1993), who suggests that the Auctor teaches his student how to appeal to the elite and thereby access political power.

¹² Calboli (1969) 41-2. See Chapter 3 for discussion of the scholarly debate regarding the Auctor's *exempla*, where I argue that they can be both political and practical.

Auctor is *popularis* or, equally, that he is being inconsistent?

Cicero's speech *Pro Sestio* is often the starting point for discussions about the *populares* and their supposed counterpart, the *optimates* ('best men', sg. *optimas*). Cicero states that there had always been two types of people who tried to succeed in the Roman state, those who wanted everything they did and said to be pleasing to the people (the *populares*) and those who would win the approval of all the best men by their actions (the *optimates*).¹³ However, as M. A. Robb discusses in detail,¹⁴ the division Cicero presents is not a neutral one and must be interpreted in the wider context of the speech and the events of the 50s BCE. Cicero's presentation of the distinction between *populares* and *optimates* is 'clearly a contingent and personalised construction'.¹⁵

The idea of two fixed political groups or parties called 'the *optimates*' and 'the *populares*' comparable to those of modern-day political systems has long been refuted,¹⁶ but Robb has gone on to look at the ancient uses of the terms in greater detail, and what ancient authors and audiences understood by them. While the use of *optimates* was fairly consistent in the ancient evidence,¹⁷ Robb's analysis showed that the term *popularis* could signify a multitude of different things in the works of different authors and even in different works by the same author.¹⁸ The historian Sallust, for example, seems to use the term with a different connotation in each of his works.¹⁹

As mentioned, the Auctor does not use the term *popularis* in the text, but a group of *optimates* do appear in the following *exemplum*:²⁰

¹³ Cic. *Sest.* 45.96: *qui ea quae faciebant quaeque dicebant multitudini iucunda volebant esse, populares, qui autem ita se gerebant ut sua consilia optimo cuique probarent, optimates habebantur*. He continues to discuss this theme for the remainder of the speech.

¹⁴ Robb (2010) 35-68, and the following chapters.

¹⁵ Robb (2010) 68.

¹⁶ E.g. Gelzer (1962). For the use, discussion and debate of the terms in scholarship see the literature review in Robb (2010) 15-33.

¹⁷ Robb (2010) 110: 'Cicero's use of the word *optimas* falls into fairly narrow categories of meaning', 145: 'all the [other] authors who use the word employ it as a synonym for aristocracy'.

¹⁸ Robb (2010) 69-93 (Ciceronian evidence); 145-6 (summary of other authors' usages).

¹⁹ Robb (2010) 114-6, 146.

²⁰ *Rhet. Her.* 4.34.45: *Aliquando rei publicae rationes, quae malitia nocentium exaruerunt, virtute optimatum revirescent*.

One day the guiding principles of the *res publica*, which have disappeared due to the wicked behaviour of criminal types, will be restored by the virtue of the *optimates*.

Caplan translates *optimates* as ‘Conservatives’, which may or may not be right here; it might be better to translate it simply as ‘best men’ as Robb notes it is generally used elsewhere.²¹ Either way, the opposite of *optimates* in this instance is not *populares* but *nocentes*, ‘criminal types’. This contrast raises questions about what being an *optimas* meant and who could be one; is it likely that the Auctor is thinking of the Gracchi, for example, when he writes *nocentes*, or rather the men who caused their deaths? Importantly, the Auctor is not compelled here by any convention of the time to use *populares* as the counterbalance to *optimates*. This would seem to confirm Robb’s findings, that there was not a sustained binary opposition between *optimates* and *populares* in the discourse of the first century BCE.²²

The reference in this *exemplum* to the ‘virtue of the *optimates*’ problematizes the Auctor’s association with the *populares*. But another *exemplum* typically used to argue for the Auctor’s support of the *populares* could also be called into question. In his list of murdered tribunes, from Tiberius Gracchus to Publius Sulpicius, what criteria led the Auctor to sympathetically include Livius Drusus, who is usually associated with the senatorial or *optimas* view?²³ Is this an indication that Drusus’ career should be re-evaluated along *popularis* lines or does it simply show that his political allegiances were not (always) significant? If there were clear dividing lines between the *populares* and *optimates*, they were not always the most important factor for the Auctor.²⁴

Adding to this impression of ambiguity is A. Russell’s recent work on tribunes.²⁵ She has argued that it is important to recognise each of the ten annually elected tribunes as

²¹ Robb (2010) 145: the term is generally used ‘as a synonym for the aristocracy’. For Cicero’s slightly more varied usage, see Robb (2010) 95–111. See also *optimates* in *Rhet. Her.* 4.8.12, which again might better be translated as ‘best men’.

²² Robb (2010) 147–8. On the lack of opposition it is also worth bearing in mind the ‘well-known fact’ (Arena [2012] 173) ‘that the *optimates* (supporters of the *status quo*) did not oppose any measure that was presented to them by those who challenged their supremacy’.

²³ As in Cic *Mil* 7.16: *senatus propugnator atque illis quidem temporibus paene patronus* (‘the champion and almost protector of the Senate at that time’); Livy *Per.* 70.10. Gruen (1968b) 207–13; Brunt (1971a) 100–2; Ungern-Sternberg (1973) 162 argues that this is evidence for how traditions are created cf. Bücher (2006) 70–1.

²⁴ See Galbraith (2004) 120–71, who draws a similar conclusion and argues more generally that at this time the *populares/optimates* divide was not a reality or present in the political discourse.

²⁵ Russell (2013). See also Kondratieff (2003); Steel (2010); Flower (2013) for tribunician oratory.

ambitious individuals in a highly competitive environment. As such, they would choose and change their political position in nuanced ways, depending on what was most advantageous at a particular time.²⁶ This suggests that not only are *optimates* and *populares* not fixed political parties; they are not even fixed or stable groups of people. At different times, politicians may have been considered to be variously *popularis* or *optimas*.²⁷ The *exempla* used by the Auctor seem to reflect this idea that an individual's career might have wide-ranging associations, as he is positive about some aspects of the Gracchi's behaviour and negative about others, such as 'planning riots'.²⁸

But scholars still emphasise that there were two fixed intellectual traditions or ideologies; L. Kaplow argues that there is a 'continuous narrative of *popularis* history' from the beginning of the Republic to the time of Cicero.²⁹ In the context of *libertas*, V. Arena has argued that the *popularis* (or democratic) and *optimas* traditions of the late Republic were defined by their approaches to liberty, justice, and sovereignty.³⁰ Politicians could gain the temporary label of *popularis* or *optimas* through 'political behaviour' and 'political strategy' that appealed either to the senate or to the people.³¹

T. P. Wiseman also argues that despite the problems with Cicero's discussion in the *Pro Sestio*, the terms *populares* and *optimates* do reflect 'two rival ideologies, two mutually incompatible understandings of what the republic was'.³² In trying to find sources of information for Z. Yavetz's statement that the Roman *plebs* were 'a class possessed of an ancient tradition',³³ Wiseman describes the *Rhetorica ad Herennium* as 'the earliest contemporary evidence for the People's point of view' as opposed to that of the senate.³⁴ However, the clear-cut divide between behaviour supportive of 'the people' (if such a body can be said to exist) and that in favour of the senate does not seem to be reflected in the

²⁶ Russell (2013) 113.

²⁷ See also David (1980c). Galbraith takes Crassus as a case study and argues that the actions of his early career were consistent, although presented differently in later sources: (2004) 134-60.

²⁸ *Rhet. Her.* 4.28.38.

²⁹ Kaplow (2012) 101. See also Panitschek (1989) and Pina Polo (2006) on negative exemplarity of tyrants; Kaplow (2013).

³⁰ Arena (2012) 6, 128: 'democratic' vs. 'optimat' traditions; 80 for the *popularis* tradition as a 'submerged ideology'.

³¹ Arena (2012) 8.

³² Wiseman (2009) 9.

³³ Yavetz (1969) 136; Wiseman (2009) 3.

³⁴ Wiseman (2009) 10.

Auctor's use of *exempla*, which can praise both or neither.³⁵

Even the assumption that the *optimates* act in favour of the senate and *populares* against it can be questioned. Another *exemplum* from the *Rhetorica ad Herennium* shows favour towards the senate.³⁶

The duty of the senate is to improve the state with its advice; the duty of the magistrate is to follow the will of the senate and people with care and effort; the duty of the people is to choose and give approval to the best things and the most suitable men with their votes.

Yet it could be argued that this does not provide conclusive support for either a *popularis* or *optimas* perspective. As F. Pina Polo argues, there were no viable alternatives to the political system in Republican Rome; it was only 'Staat oder nicht Staat'.³⁷ Pina Polo adds that *populares* were seen as 'innovators' (Neuerer) not 'redesigners' (Umgestalter).³⁸ Therefore, whatever the political leanings or beliefs of the Auctor, it is perhaps not surprising to find the senate praised. It may be an unrealistic assumption to expect any tradition to be opposed to the senate or existing political system.

The comparisons I have made between the *exempla* of the *Rhetorica ad Herennium* and those of the *De Inventione* in the previous chapter show that there were alternative intellectual and political traditions. However, despite (or perhaps because of) the lack of overlap between their two exemplary traditions, it is not clear that they are 'mutually incompatible' on all subjects (as Wiseman suggests), or that there were only two traditions to choose from.³⁹

For a modern scholar, the lack of a conclusive, stable definition of *popularis* in the ancient world and the uncertainty about the range and scope of distinct intellectual traditions makes it hard to use the term with confidence. Nevertheless, it is still important to think

³⁵ See discussion of relevant literature in Chapter 3.

³⁶ *Rhet. Her.* 4.35.47: *Senatus est officium consilio civitatem iuvare; magistratus est officium opera et diligentia consequi senatus et populi voluntatem; populi est officium res optumas et homines idoneos maxime suis sententiis deligere et probare.*

³⁷ Pina Polo (1996) 65.

³⁸ Pina Polo (1996) 78.

³⁹ See Arena (2012) 173-7.

about how it could be used because, put simply, it obviously did mean something in the discourse of the first century BCE. By carefully examining the terminology where it appears and considering the attitudes expressed in the sources objectively, it is possible to create a more complex and difficult picture that nevertheless reflects reality more accurately.

The *Rhetorica ad Herennium* can add to the debate about the status of *popularis* and *optimas* thought in the early first century BCE, but it does not help to clarify the terms or to neatly align the Auctor with one side or the other. The Auctor's use of *exempla* does not seem to be entirely consistent with or encompassed by the intellectual traditions or ideologies proposed by modern scholars. However, this is not to say that those traditions or ideologies did not exist in the suggested forms, only that they do not tell the whole story.

Although the political associations of the Auctor must remain somewhat vague, and the oratory he advocates cannot therefore be described as *popularis*, there are more general ways in which the *Rhetorica ad Herennium* can be instructive about the styles of oratory that were available in the Roman Republic. For example, the frequent presence of verbal abuse in the *Rhetorica ad Herennium* suggests that it is a significant feature of Roman oratory. Connected with this, the *exempla* used in the Auctor's discussion of *licentia* also give an insight into the freedom of speech allowed to orators. In both cases, past scholars have used the relevant *exempla* to support arguments in favour of the Auctor being a *popularis*. This may not be a valid assumption, but the use of invective and the technique of *licentia* suggest that the oratory the Auctor advocates and teaches is certainly not conservative but challenges and pushes the boundaries of what is acceptable speech in Rome.

Invective: topics and victims of verbal abuse

You dare to act shamefully, you speak wickedly on purpose, you live offensively, you misbehave intentionally, and you have a tiresome style of speaking.⁴⁰

⁴⁰ *Rhet. Her.* 4.20.28: *Turpiter audes facere, nequiter studes dicere; vivis invidiose, delinquis studiose, loqueris odiose.*

Now why would you think that someone you know is fickle in friendship could be reliable in animosity? Or hope that someone whose pride was unbearable as a private individual would be obliging and self-critical when in power? And that someone who would never tell the truth in conversations or among groups of friends would stop himself from lying in *contiones*?⁴¹

Examples of invective or verbal abuse such as those quoted above are frequently found in the *Rhetorica ad Herennium*, giving the impression of an oratorical culture reliant on such outbursts. The relevant *exempla* often lack context but their aim is clear: words and deeds, private and public life, are woven together to create a negative picture of the opponent. As seen here, belittling, insulting or ostracising an opponent through invective was a technique advocated by the Auctor.

Invective has been the subject of many scholarly studies. There is no Latin equivalent for the English word ‘invective’, although it derives from the Latin verb *invehi*, which is used to describe verbal attacks.⁴² For this reason, different scholars define invective in slightly different ways. J. G. F. Powell makes a distinction between a general verbal attack contained within a speech (as in Cicero’s *First Catilinarian* or *Pro Murena*) and a speech that is wholly intended to be ‘direct personal attack’ (such as Cicero’s *In Pisonem*, *In Vatinius* or *Second Philippic*), which he calls invective.⁴³ However, many scholars choose to use a more inclusive definition of invective. Arena suggests that speeches that aim to discredit the opponent through verbal attacks for a persuasive purpose may also be considered invective.⁴⁴ As the wider context of many of the *exempla* in the *Rhetorica ad Herennium* is unknown, they will be analysed as examples of invective in line with the broader definition of the term.

⁴¹ *Rhet. Her.* 4.18.25: *Nam quem in amicitia perfidiosum cognoveris, eum quare putes inimicitias cum fide habere posse? Aut qui privatus intollerabili superbia fuerit, eum commodum et cognoscentem sui fore in potestate qui speres, et qui in sermonibus et convenit amicorum verum dixerit numquam, eum sibi in contionibus a mendacio temperaturum?*

⁴² Powell (2007) 2.

⁴³ Powell (2007) 2.

⁴⁴ See Arena (2007) 150. Cf. Gildenhard (2007b) 149. For verbal attacks as a feature of *inimicitiae*, see Epstein (1987) 76-8. For a recent analysis of Cicero as the target of invective, see van der Blom (2014) with the introduction Icks and Shiraev (2014) and Shiraev (2014).

Due to the survival of evidence, the majority of the studies carried out have focused on Ciceronian invective.⁴⁵ However, some scholars have traced the development of invective through the fragments of earlier orators,⁴⁶ and found parallels between the themes of abuse in earlier authors and in Cicero's work.⁴⁷ As a result of the Ciceronian studies, it has been suggested that highly-coloured invective was less likely to occur in a civil case with a single judge, and more likely to be a feature of large criminal trials, public assemblies and senatorial speeches.⁴⁸

In the *Rhetorica ad Herennium*, no distinction is made between civil and criminal court cases.⁴⁹ This does not mean that there was not a difference in approach to invective, but the Auctor evidently did not feel the need to mention it. Nevertheless, the Auctor explicitly encourages verbal abuse in different contexts. It is first discussed with reference to the Introduction to a Judicial speech in the forum, where the Auctor says it should be used to make the opposition unpopular and the audience sympathetic.⁵⁰ In the main body of a Judicial speech verbal abuse also plays a significant role when discussing how the defendant's manner of life (*vita hominis*) can influence the probability of a crime.⁵¹ In the senate or an advisory meeting,⁵² the speaker is encouraged to challenge an opponent's *deprecatio* (Plea for Mercy) 'with the elaboration and enumeration of the defendant's wrongdoings'.⁵³ The Auctor is also explicit about Epideictic oratory, which is divided between praise and censure (*laus et vituperatio*).⁵⁴ Although this style of oratory is not often in demand, Judicial and Deliberative oratory frequently use the same techniques. According to the Auctor, then, a similar style of invective can be found across the different types and contexts of public speech in Rome.⁵⁵

⁴⁵ E.g. DeLacy (1941); Corbeill (1996); Hughes (1998); Corbeill (2002b); Booth (2007). Hammar (2013) examines the related idea of immorality in Ciceronian oratory and Roman political culture.

⁴⁶ Koster (1980) 97-112. See also the brief summary in Nisbet (1961) 193.

⁴⁷ Merrill (1980) 45-97. See also Dunkle (1967) on the development of *tyrannus*.

⁴⁸ Arena (2007) 155.

⁴⁹ See discussion in Chapter 5.

⁵⁰ *Rhet. Her.* 1.5.8. See Craig (2004) 192-4.

⁵¹ *Rhet. Her.* 2.3.5. See Craig (2004); Riggsby (2004) for the implications of 'rhetoric of character', including invective, as a legal argument. Cf. *Cic. Inv. rhet.* 2.32-7, *Sull.* 79.

⁵² *Rhet. Her.* 3.3.5.

⁵³ *Rhet. Her.* 2.17.25: *cum amplificatione et enumeratione peccatorum*.

⁵⁴ *Rhet. Her.* 3.6.10. Craig (2004) 189.

⁵⁵ Cf. Antonius in *Cic. De or.* 2.349: *laus* and *vituperatio* can be found *in omni genere causarum*.

Both Cicero and the Auctor explain how invective should work, although for different contexts. Cicero details the connection between ‘rhetoric of character’ and legal success,⁵⁶ explaining that the honesty and authority of the defendant is proportionally related to the strength of the defence. If invective can weaken the defendant’s credibility, then the case is weakened too.⁵⁷ The Auctor acknowledges invective’s power to persuade when discussing Deliberative oratory. He notes that as the orators censure (*vituperare*) they can also restrict (*definire*), discourage (*dissuadere*) and set limits (*modum statuere*) on the discussion.⁵⁸

The topics of invective advocated and used by the Auctor are wide-ranging. The Auctor divides *vituperatio* into three subsections: External Circumstances (*res externae*), Physical Appearance (*corpus*) and Character (*animus*).⁵⁹ This is the standard division, which is also found in the *De Inventione*, although Cicero also gives several additions to the scope of invective by proposing that it can also concentrate on people’s names and their nature-given circumstances.⁶⁰

In his advice for the Introduction, the Auctor focuses on the first of the subsections, External Circumstances, in seeming to single out the wealth and high birth of the *nobiles*:⁶¹

We stir up hatred against our opponents if we set out their use of violence, their influence, wealth, self-indulgence, high birth, body of clients, hospitality, social group and connections – and we make it known that they place more trust in these supports than in the truth.

This is particularly significant because Cicero, in a parallel passage of the *De Inventione*, does not include the criteria of *nobilitas* (‘high birth’), although the list is otherwise very similar. This omission on Cicero’s part (or addition on the Auctor’s) perhaps suggests Cicero’s desire to be neutral in his presentation. Cicero also describes other possible attributes neutrally, by giving two opposites. If the opponent is a public official, Cicero

⁵⁶ See Riggsby (2004).

⁵⁷ Cic. *Inv. rhet.* 2.10.33.

⁵⁸ *Rhet. Her.* 3.3.5. See Arena (2007) 154 with further references.

⁵⁹ *Rhet. Her.* 3.6.10.

⁶⁰ Cic. *Inv. rhet.* 2.69.177, cf. 1.24.34–25.36, 2.9.28–34.

⁶¹ *Rhet. Her.* 1.5.8: *In invidiam trahemus si vim, potentiam, factionem, divitias, incontinentiam, nobilitatem, clientelas, hospitium, sodalitatem, affinitates adversariorum proferemus, et his adiumentis magis quam veritate eos confidere aperiemus.* This might suggest that the Auctor expects his readers’ future cases to include criminal trials involving high profile figures.

suggests they might be asked whether the role was attained ‘lawfully or unlawfully’.⁶² In this way, Cicero gives a greater number of options to his reader than the Auctor and does not impose his own preconceptions about the client or opponent onto the text. By contrast, the Auctor’s readiness to encourage direct verbal abuse is also evident elsewhere.

There are other *exempla* in the *Rhetorica ad Herennium* that illustrate the variety of different topics and subjects of invective. Several of these topics (*topoi*) are demonstrated by one particular *exemplum* in Book 4. It begins by asking ‘from which vice, then, is this man free?’ signalling the intent of the speaker to accuse the defendant of all possible vices, *vitia*.⁶³ The *exemplum* goes on to list the vices that the defendant is (supposedly) guilty of, which are worth quoting in full:⁶⁴

He is a betrayer of his own virtue, and plots against the virtue of others; greedy, headstrong, insolent and arrogant, he is disrespectful to his ancestors, ungrateful to his friends, hostile to his family. Defiant to those above him, disdainful to his equals and cruel to those beneath him; in short, he is intolerable to everyone.

This is not, in reality, a comprehensive list of all the possible *topoi* of invective that appear in the *Rhetorica ad Herennium* or elsewhere. It is more concerned with the everyday behaviour of the defendant in society than with the qualities that are often associated with public or political success (such as oratorical or military ability). The defendant is accused, in various ways, of treating other people (including himself) unfairly and without reference to their status in society. The *exemplum* also illustrates how forms of bad behaviour can be connected together to the extent that they almost follow on naturally from one another.⁶⁵ At this point the *exemplum* makes the expected reaction of the audience explicit: the defendant is intolerable (*intollerabilis*) to everyone.

It is possible to compare the contents of this *exemplum*, and the other instances of invective in the *Rhetorica ad Herennium*, with the list of *topoi* collected by N. W. Merrill and C.

⁶² Cic. *Inv. rhet.* 1.25.35: *si cum potestate, iure an iniuria.*

⁶³ *Rhet. Her.* 4.40.52: *a quo tandem abest iste vitio?*

⁶⁴ *Rhet. Her.* 4.40.52: *Suae pudicitiae proditor est, insidiator alienae; cupidus, intemperans, petulans, superbus; inpius in parentes, ingratus in amicos, infestus cognatis; in superiores contumax, in aequos et pares fastidiosus, in inferiores crudelis; denique in omnis intollerabilis.*

⁶⁵ Cf. Craig (2004) 191: *In Pisonem* uses 13 of the 17 *loci* identified by Craig, and the *Second Philippic* uses 15.

Craig.⁶⁶ Craig has studied the subjects of invective used in Cicero's work, while Merrill focused on those that appear in the surviving pre-Ciceronian invective (but not including the *Rhetorica ad Herennium*). It is notable that the lengthy roll call of accusations in the *Rhetorica ad Herennium* bears more resemblance to the more detailed, Ciceronian list of *topoi* identified by Craig than that of Merrill, whose *topoi* are drawn from a smaller body of evidence. In fact, this additional evidence from the *Rhetorica ad Herennium* demonstrates that pre-Ciceronian invective was more varied than Merrill realised.

Apart from the informatively damning *exemplum* above, many other topics of invective are covered by the remaining *exempla* of the *Rhetorica ad Herennium*. There are many overlaps with the *topoi* listed by Merrill and Craig: military ability is mentioned,⁶⁷ accusations of the plunder of foreign cities appear,⁶⁸ as do references to the plunder or despoiling of private households.⁶⁹ The charge of 'excess in everything' (*omnium intemperantiae*) implies the inclusion of, probably, drunkenness and sexual misconduct.⁷⁰ Squandering a patrimony, 'so quickly' (*tam cito*), is the exaggerated charge against one man,⁷¹ and in two cases poverty is given as a motive for an alleged crime.⁷² The physical appearance of the opposition also comes under scrutiny.⁷³ Cruelty, too, is mentioned explicitly in three *exempla* and is implied in many others,⁷⁴ while the theme of a cruel punishment is implicit in the *exemplum* of the soldier and the master, as well as in the account of Tiberius Gracchus' death.⁷⁵ The more serious charge of *regnum* or tyranny is also present as a commonplace argument (*locus communis*).⁷⁶ Incorrect speech (*oratio inepta*) is not tackled, but there are criticisms of offensive and deceitful speech.⁷⁷ Hostility

⁶⁶ *Topoi* in Merrill (1980) 50-97: aspiring to *regnum*; sexual misconduct; plunder; cruel and unusual punishment; effeminate behaviour and appearance; drunkenness; *oratio inepta*; *turpitude generis*. *Topoi* in Craig (2004) 190: embarrassing family origin; unworthy of one's family; physical appearance; eccentricity of dress; gluttony and drunkenness (possibly leading to acts of *crudelitas* and *libido*); hypocrisy for appearing virtuous; avarice (possibly linked with prodigality); taking bribes; pretentiousness; sexual misconduct; hostility to family (*misophilia*); cowardice in war; squandering of one's patrimony/financial embarrassment; aspiring to *regnum* or tyranny (associated with *vis*, *libido*, *superbia* and *crudelitas*); cruelty to citizens and allies; plunder of private and public property; oratorical ineptitude.

⁶⁷ *Rhet. Her.* 4.27.37.

⁶⁸ *Rhet. Her.* 4.27.37.

⁶⁹ *Rhet. Her.* 4.39.51.

⁷⁰ *Rhet. Her.* 4.27.37.

⁷¹ *Rhet. Her.* 4.53.67.

⁷² *Rhet. Her.* 4.40.52, 4.40.53.

⁷³ *Rhet. Her.* 4.49.63, 4.50.63.

⁷⁴ *Rhet. Her.* 4.24.33, 4.34.45, 4.40.52.

⁷⁵ *Rhet. Her.* 4.52.65, 4.55.68.

⁷⁶ *Rhet. Her.* 2.30.49. Cf. Cic. *Inv. rhet.* 1.53.102. See also *Rhet. Her.* 2.26.40: *Satius est uti regibus quam uti malis legibus* ('It is better to endure kings than to endure bad laws'). See Dunkle (1967) 158 and *passim* for terms associated with *rex/dominatio/tyrannus* and the development of the term in Roman invective.

⁷⁷ *Rhet. Her.* 4.20.28, 4.18.25, 4.50.63.

or bad behaviour towards one's own family appears in the above example and one other,⁷⁸ and being unworthy of one's family falls under the censure of External Circumstances in Epideictic oratory.⁷⁹ There is also an amusing insult based on family origin (*turpitudine generis*): 'You be quiet – your father used to wipe his nose on his sleeve!'⁸⁰

In fact, there are only a few *topoi* from the lists of Merrill and Craig that do not appear in the *Rhetorica ad Herennium*, such as effeminacy or eccentricity of dress, hypocrisy, and bribery. It would be unwise to argue from silence that these issues were not important at the time of writing, but perhaps their absence is a sign that the Auctor had more pressing or prominent concerns. The most common accusation in the text by some way is greed and selfishness,⁸¹ with the connected issues of arrogance and vanity not far behind.⁸² From a practical perspective, the frequency of these charges might be due to their wide and rather vague applicability, making them useful in court cases.⁸³ Even so, it is remarkable that the *Rhetorica ad Herennium* illustrates such a wide variety of invective themes, providing a concentrated overview of ways in which an opponent could be criticised and dismissed. The frequency and repetition of invective suggests that the Auctor expected this style and mode of speech to be particularly important for his readers.

There are far fewer examples of invective in the *De Inventione*. Cicero gives three brief *exempla* to illustrate invective: two accuse the opponent of avarice, and the other of poverty.⁸⁴ As in the *Rhetorica ad Herennium*, avarice also appears elsewhere,⁸⁵ and two other *exempla* discuss tyranny in a Greek context.⁸⁶ Cicero also gives a rare concrete example to demonstrate the success of an appeal to character in the case of Quintus

⁷⁸ *Rhet. Her.* 4.28.38.

⁷⁹ *Rhet. Her.* 3.7.13.

⁸⁰ *Rhet. Her.* 4.54.67: *Quiesce tu, cuius pater cubito se emungere solebat*. See Corbeill (1996) for the role of humour in invective and David (1983) 315–8 for the possible restrictions and criticisms faced by some orators trying to access the 'Roman' sense of humour. Conversely, see the list of positive behaviours that can be used in Deliberative oratory, *Rhet. Her.* 3.3.4–7.4.

⁸¹ *Rhet. Her.* 4.20.28, 4.25.35, 4.27.37, 4.40.52 (x2), 4.40.53, 4.49.63, 4.50.63.

⁸² *Rhet. Her.* 4.18.25, 4.21.29, 4.40.52, 4.20.28. Cf. Corbeill (2002b) 204 (discussing later Ciceronian invective): 'If invective did in fact function to limit improper behaviour by the elite, determining the types of charges most commonly advanced will shed light on the kinds of behaviour deemed most inimical to the maintenance of political stability'.

⁸³ Although Nisbet thinks that the charge of avarice might be, in general, 'more often true than some others': (1961) 195. For the connection between general charges and falsity, see also Delacy (1941) 56; cf. Craig (2004) 189.

⁸⁴ *Cic. Inv. rhet.* 1.46.84, 1.47.88, 1.50.95.

⁸⁵ *Cic. Inv. rhet.* 2.10.32, 2.10.33, 2.10.34.

⁸⁶ *Cic. Inv. rhet.* 2.49.144 (x2). See also 1.53.102, parallel to *Rhet. Her.* 2.30.49.

Numitorius Pullus, whose Plea for Mercy was more persuasive than the techniques of the Conjectural Issue in a *consilium*.⁸⁷ As seen elsewhere, Cicero is more theoretical in his approach and this gives his work a generalising tone and application in comparison with the *exempla* of the Auctor's practical guide.

The Auctor's enthusiastic application of invective and Cicero's more restrained attitude might also be the result of other factors. David has examined the terms used by Cicero decades later in the *Brutus* and concluded that Cicero frequently uses distinct terms such as *vehemens* to describe the oratorical style of speakers from municipal towns, those acting as accusers and *popularis* tribunes.⁸⁸ It seems likely that this descriptor refers to their use of invective as well as the other stylistic aspects of the '*popularis*' performance that David mentions, such as delivery and supplication of the audience.⁸⁹ While acknowledging that, for some, this *vehemens* self-representation could be a temporary choice,⁹⁰ David also argues that this style reflected a speaker's isolation from or rejection of the Roman elites.⁹¹ This is not applicable to the young Cicero, educated under the aegis of Crassus and Antonius, but it may be a way of understanding the Auctor's use of invective and his incorporation of it within the *Rhetorica ad Herennium*.⁹² The frequency of attacks on avarice and the Auctor's pointed inclusion of 'high birth' among an opponent's likely faults show that the Auctor was willing for his students to aim their invective at the rich and powerful. The Auctor's invective sets itself against the norms of the ruling elite.

It should be remembered that the *exempla* of the *Rhetorica ad Herennium* supply the charges rather than the offence, so the Auctor is not specific about where the boundaries of vices such as greed or dishonour are defined.⁹³ In one sense, the subjective nature of these charges makes them easier to use, although it requires the orator to be highly sensitive to the attitudes of his audience. The orator can use the ambiguity to his advantage and set new boundaries in accordance with his own argument. A. Riggsby suggests that arguments from character were limited by 'public belief', but the implication of the *Rhetorica ad*

⁸⁷ Cic. *Inv. rhet.* 2.34.105.

⁸⁸ NB. These groups may not be mutually exclusive. David (1979), (1980c) esp. 177-80, (1983) esp. 310-2.

⁸⁹ David (1980c) 183-6.

⁹⁰ David (1980c) esp. 174. See also Russell (2013), as discussed in the first section.

⁹¹ David (1983) 315-22.

⁹² Powell (2007) 10, 14 also suggests that orators of a lower standing or skill are much more likely to resort to invective. Cf. Quint. *Inst. Or.* 12.9.8-13.

⁹³ Powell (2007) 18: 'Every culture has its own scale of values'.

Herennium is that the public were often willing to believe the worst in their fellow citizens.⁹⁴ The range of charges, vices or accusations that an orator could make against an opponent implies an audience with a narrow conception of ‘good’ and a broad conception of ‘bad’.

In all, the evidence contained within the *Rhetorica ad Herennium* shows that the art of invective was widespread and well known in oratory by the Auctor’s time, just as Riggsby describes the ‘strong expectation’ of arguments from character amongst Cicero’s audiences.⁹⁵ From the Auctor’s use of *exempla* it seems that avarice was one of the most frequent and/or most effective subjects of contemporary invective. The concentration of invective themes occurring in the *Rhetorica ad Herennium* further implies that the tone and content of invective was common to speeches in the Roman Republic and worthy of encouragement according to the Auctor.⁹⁶

Yet a question remains about the Auctor’s ability to repeat these *exempla* and support further repetition without fear of reprisal. In the next section I will examine the concept of freedom of speech and *licentia*, a rhetorical technique that appears in Book 4 of the *Rhetorica ad Herennium* and has several interesting *exempla* attached to it.

***Licentia*: the boundaries of free speech?**

As discussed above, the Auctor is able to sympathetically recount the deaths of controversial tribunes,⁹⁷ or to encourage his students to criticise men of high birth,⁹⁸ without any apparent fear of reprisal. Although it is not clear that ‘freedom of speech’ existed as a concept in Rome, the Auctor and his readers operated in a state of freedom to speak. The negative counterpart of this state of speaking freely is known to scholars as *licentia*, ‘license’, but this appears in the *Rhetorica ad Herennium* as a recognised

⁹⁴ Riggsby (2004) 175, cf. 179. Corbeill (1996) tries to reconstruct where these beliefs (and prejudices) originated.

⁹⁵ Riggsby (2004) 173.

⁹⁶ The persuasive function of invective is also discussed by Corbeill (2002b) 198; Arena (2007) 150-1, cf. Corbeill (1996) 5. Kaster (2005) connects emotional response and behaviour in a relevant way.

⁹⁷ *Rhet. Her.* 4.22.31

⁹⁸ *Rhet. Her.* 1.5.8.

rhetorical technique: Frankness of Speech.⁹⁹ In this section I will show that *licentia* is not a negative term for the Auctor but something that he encourages.

It is not just the Auctor who can say whatever he likes in his *exempla*; it is tellingly rare that he instructs his students not to say something. In one exception, he does imply that discretion might be necessary in some cases, for which the technique of Antonomasia or Pronomination (*pronominatio*) can be used. This is a Figure of Diction that allows orators to use epithets to describe things ‘that cannot be called by their actual name’.¹⁰⁰ The example the Auctor gives here is of the Gracchi, which is interesting because he mentions them so frequently throughout the work.¹⁰¹ Despite his own free use of their names, he implies (or recognises) that it might not always be politic to mention them explicitly. The Auctor says that this technique can be used ‘to speak both approvingly and critically, either about their physical appearance, character or external factors’.¹⁰² In this way, an orator is able to discuss topics that may appear controversial under the guise of saying something else.

The lack of evidence for libel laws and defamation cases in Rome supports the existence of freedom of speech, although it may be that the sources are simply lacking this information. As R. E. Smith showed, the law of libel at Rome is not well attested in the surviving sources.¹⁰³ According to Cicero, there was a clause in the fifth century Twelve Tables stipulating that singers and authors of slanderous songs should be put to death.¹⁰⁴ Unfortunately the application of this clause in the later period is little understood. One instance is recorded by Aulus Gellius, where the poet and playwright Naevius is imprisoned, apparently charged under the clause in the Twelve Tables.¹⁰⁵

Besides this, it is the *Rhetorica ad Herennium* itself that provides the only other evidence for charges against defamation in the second century. Rather than using the clause from the

⁹⁹ *Rhet. Her.* 4.36.48-37.50.

¹⁰⁰ *Rhet. Her.* 4.31.42: *Pronominatio est quae sicuti cognomine quodam extraneo demonstrat id quod suo nomine non potest appellari.*

¹⁰¹ See discussion in Chapter 3.

¹⁰² *Rhet. Her.* 4.31.42: *et in laudando et in laedendo, in corpore aut animo aut extraneis rebus dicere.*

¹⁰³ Smith (1951).

¹⁰⁴ *Cic. Rep.* 4.10.11.

¹⁰⁵ *Gell. NA* 3.3.15.

Twelve Tables, in Book 1 the Auctor describes the poet Accius suing for *iniuria* against a mime who had named him on stage.¹⁰⁶ The Auctor returns to this in Book 2 and uses it as a warning about the inconsistency of legal precedents; the mime was condemned but the man who attacked the satirist Lucilius on stage in a similar case was acquitted.¹⁰⁷ This shows that there was not a consistent policy or stance on this type of *iniuria* when these judgments took place (around 136 and before 103 BCE respectively), despite the likelihood that the charge would have to be formally listed in the Praetor's Edict in order to be tried in this way.¹⁰⁸ Instead, Publius Mucius Scaevola and Gaius Caelius, who acted as judges, were able to cast opposing verdicts for the same crime. These *exempla* serve as a warning, perhaps, that conviction was possible. But they could also be read as an encouragement: the uncertainty around the offence could be used to an orator's advantage as long as they knew how.¹⁰⁹

In practice, the freedom to speak in the Roman Republic has been recognised,¹¹⁰ but the existence of 'freedom of speech' as a concept has been debated. The debate arises from the fact that the Romans did not have a separate word for speaking freely, unlike the Greek *parrhesia*, only a general term for freedom (*libertas*).¹¹¹ P. A. Brunt argued that freedom of speech was integrated within the Roman idea of *libertas*;¹¹² by contrast, A. Momigliano thought that freedom of speech was not connected to *libertas*, seeing this as typical of the Roman Republic.¹¹³ In the sources, phrases such as *lingua libera* and *oratio libera* appear instead of a single, fixed term.¹¹⁴

¹⁰⁶ *Rhet. Her.* 1.14.24.

¹⁰⁷ *Rhet. Her.* 2.14.20. Cicero later associates Lucilius' writing with *libertas* (Cic. *ad Fam.* 12.16.3) but in a way that could be translated as 'license', see Gruen (1992) 295-301.

¹⁰⁸ Smith (1951) 171. See Watson (1970), in which he argues that few substantive changes were made to the Praetor's Edict before c.140 BCE. See also, briefly, Lindsay (1949). It is also worth noting that, besides this *exemplum*, the Auctor describes insulting language (*convicium*) as an *iniuria* twice in the text. *Rhet. Her.* 2.26.41: *Item vitiosum est falsis aut vulgaribus definitionibus uti. Falsae sunt huiusmodi, ut si quis dicat iniuriam esse nullam nisi quae ex pulsatione aut convicio constet* ('it is also a mistake to use either false or generic definitions. A kind of false definition is if someone should say there is no crime of *iniuria* unless it is the result of assault or verbal abuse'); *Rhet. Her.* 4.25.35: *Iniuriae sunt quae aut pulsatione corpus aut convicio auris aut aliqua turpitudine vitam cuiuspiam violent* ('crimes of *iniuria* are those that do violence to a person's life either by physical assault, verbal abuse or some disgrace').

¹⁰⁹ After these trials in the second century it is debated as to whether defamation was included in Sulla's legal reforms (as argued by Smith ([1951] 172-6) or if it remained a vague offence until the time of Augustus. Brunt (1988) 316 says there is 'no proof' for laws about slander or libel before imperial times.

¹¹⁰ Raaflaub (2004).

¹¹¹ Raaflaub (2004) 57.

¹¹² Brunt (1988) 316.

¹¹³ Momigliano (1971) 521.

¹¹⁴ E.g. Plaut. *Cist.* 1.2.9; Quint. *Inst.* 9.2.27.

The unresolved debate about freedom of speech as a concept means that *licentia* is also difficult to understand. Scholars seem to agree that when speech became too free in the Roman Republic it was labelled *licentia*.¹¹⁵ S. M. Braund defines *licentia* as ‘an exercise of freedom of which the speaker does not approve’, implying that the term has an unavoidably negative connotation and was used to criticise or diminish what another speaker had said.¹¹⁶ C. Wirszubski defines *licentia* as ‘the unqualified power to do whatever one likes’, which is outside the law, unlike *libertas*.¹¹⁷ Yet the term *licentia* appears in the *Rhetorica ad Herennium* as a Figure of Thought (*sententiae exornatio*).¹¹⁸ Its very inclusion in the rhetorical handbook as a technique that can and should be used undermines the idea that *licentia* was always unwelcome or ‘going further than the norm’.¹¹⁹

In fact, the Auctor does not think *licentia* is inherently negative or outside the law. Rather, *licentia* is when ‘we say something, as is our right (*ius*)’ to an audience to whom it is ordinarily better to fear or show respect.¹²⁰ The Auctor goes on to say that such frankness will stop the listener making a mistake (*ab errato deterreat*). Hence the Auctor’s definition supports the idea that orators had a right to speak, at least in some circumstances, and the Auctor associates this right with the term *licentia*.¹²¹ Therefore, in the Auctor’s opinion, *licentia* could be a necessary undertaking used for the greater good.

¹¹⁵ The Auctor also advises that it is a tactic of the defence advocate to accuse the prosecutor of *calumnia*, which can be understood as ‘slander’, ‘false accusation’ or ‘vexatious proceedings’ (*Rhet. Her.* 2.6.9).

¹¹⁶ Braund (2004) 409. Cf. Wirszubski (1950); Hellegouarc’h (1963) 558-9; Brunt (1988) 314.

¹¹⁷ Wirszubski (1950) 7.

¹¹⁸ *Rhet. Her.* 4.36.48-50.

¹¹⁹ Sluiter and Rosen (2004) 17. In fact, as Sluiter and Rosen note in a footnote to their introduction, the *Rhetorica ad Herennium* defines *licentia* in a way that might be translated as ‘open speech’ (4.36.48-50), and Quintilian as ‘poetic licence’ (*Inst.* 9.2.27-28): Sluiter and Rosen (2004) 4, n.5. However it seems that these translations are an indication of the authors’ preconceptions about what *licentia* should be on these occasions rather than an objective examination of their context. *Licentia* does not appear in Cicero’s *De Inventione*. See also the OLD² definitions (3) ‘Freedom of speech, outspokenness’ and (4) ‘Freedom in the use of words, rhetorical or poetic licence’. Scarpit (1964) 111 suggests that employing the term *licentia* was a conscious choice to use an objective (rather than moral or political) term. Hülsewiesche (2002) 115 suggests that, in early Latin at least, *licentia* was close in meaning to *libertas*.

¹²⁰ *Rhet. Her.* 4.36.48: *Licentia est cum apud eos quos aut vereri aut metuere debemus tamen aliquid pro iure nostro dicimus*.

¹²¹ See, perhaps, Cicero’s *lex accusatoria* in *Mur.* 11 (Corbeill [1996] 17).

The Auctor gives five *exempla* of varying lengths to illustrate *licentia*.¹²² Here I will focus on two of these *exempla*, which are of particular interest to the subject of this chapter as a whole.¹²³ They are both addressed to the *Quirites* ('fellow citizens'), which suggests that they represent a speech in a *contio* and illustrate the way in which a speaker could address the people in the forum. The first *exemplum* encourages the people to remember the representatives they have lost, and to feel regret about their own inadequate response:¹²⁴

Are you surprised, fellow citizens, that everyone is abandoning you? That no one takes up your cause? That no one promises to come to your defence? Accept your responsibility, don't be surprised. After all, what reason is there for everyone not to run away and avoid this situation? Remember who you had defending you; bring their efforts on your behalf into your mind's eye; then think about the fate of all of them. Then remember, if I may speak truthfully, that all those men were massacred before your eyes by your own lack of care, or rather, lack of spirit, and that their enemies have achieved the most distinguished positions through your votes.

In what must have been a tense and difficult time, the speaker makes no effort to appease the people but instead attacks and riles them, provoking a reaction by taking a 'tough love' approach. The use of dismissive and critical language is striking: the people are accused of indifference and cowardice and blamed for the political success of murderers. These terms, P. M. Martin notes, are the same as those used to denounce the *nobiles*.¹²⁵ Martin sees this *exemplum* as part of a larger theme of the people's passivity and betrayal, which recurs in the *Rhetorica ad Herennium* and in Sallust's later work, the *Jugurthine War* in particular.¹²⁶ These parallels may also have influenced the commentator Caplan, who suggests that this speech could belong to a tribune around the time of Marius.¹²⁷

¹²² *Rhet. Her.* 4.36.48-37.49.

¹²³ Regarding the other three *exempla*, one is hard to analyse, being short and without any clues about its context (*Rhet. Her.* 4.36.49: *Hic ego virtutem vestram quaero, sapientiam desidero, veterem consuetudinem requiro* ['Here I call on your virtue, I demand your knowledge, I need your long experience']). Two are addressed to the *iudices* ('men of the jury') and are discussed in Chapter 5. See discussion in Ungern-Sternberg (1973) 158-61.

¹²⁴ *Rhet. Her.* 4.36.48: *Miramini, Quirites, quod ab omnibus vestrae rationes deserantur? Quod causam vestram nemo suscipiat? Quod se nemo vestri defensorem profiteatur? Id tribuite vestrae culpae, desinite mirari. Quid est enim quare non omnes istam rem fugere ac vitare debeant? Recordamini quos habueritis defensores; studia eorum vobis ante oculos proponite; deinde exitus omnium considerate. Tum vobis veniet in mentem, ut vere dicam, negligentia vestra sive ignavia potius, illos omnes ante oculos vestros trucidatos esse, inimicos eorum vestris suffragiis in amplissimum locum pervenisse.*

¹²⁵ Martin (2000) 34.

¹²⁶ *Rhet. Her.* 4.15.22, 4.22.31, 4.45.58 (x2), 4.53.66, 4.55.68; *Sall. Hist.* 1.55 M 6, 20, 25; 3.48 M 8, 13, 5, 20, 26. Martin (2000) 34-9. Cf. *Sall. BJ* 3.3, 5.1, 27.2, 31.1, 2, 7, 13.

¹²⁷ Caplan (1954) *ad loc.*

The second *exemplum* follows, after the Auctor admits that *licentia* can be used manipulatively. The *exemplum* is designed to illustrate an instance of the *Quirites* hearing what they want to hear, despite being ostensibly chastised.¹²⁸

Fellow citizens, you are too naïve and gentle in character; you believe in everyone too much. You think that everyone is trying to achieve what you have been promised. But you are mistaken, and you have been held back for a long time now by this false, pointless hope and by your own ignorance, preferring to seek from others what was in your power rather than take it yourselves.

Again, the speaker of the *exemplum* mocks and blames the audience through a direct address to emphasise the disastrous consequences of their inaction.¹²⁹ Martin describes this as another form of invective and argues that this particular form of attack is a relatively rare oratorical figure that *populares* used to mobilise the people and preserve their own lives.¹³⁰ Despite the failure of the technique from that perspective (if that was its aim), the Auctor encourages his reader to use it when necessary. Both juries and citizens should be challenged and criticised through oratory in order to achieve certain aims.

It should be noted that both of these *exempla* are *popularis* in a literal way, in that they either explicitly or implicitly recognise the power held by the people in the state. In the first *exemplum*, the people have elected the enemies of their murdered defenders by their votes (*vestris suffragiis*). In the second, they have the power (*potestas*) to take for themselves what has been promised. In this way, as with the criticism of high birth and avarice in *exempla* relating to invective, the Auctor suggests that his readers should challenge the behaviour and power of the elites.

Some have argued that the freedom of speech was applicable only to certain speakers. K. Raaflaub has argued that freedom of speech was politically connected to *auctoritas* and hence belonged to the elite.¹³¹ I. Gildenhard also suggests that the ‘abusive freedom of

¹²⁸ *Rhet. Her.* 4.37.49: *Nimium, Quirites, animis estis simplicibus et mansuetis; nimium creditis uni cuique. Existimatis unum quemque eniti ut perficiat quae vobis pollicitus sit. Erratis et falsa spe frustra iam diu detinemini stultitia vestra, qui quod erat in vestra potestate ab aliis petere quam ipsi sumere maluistis.*

¹²⁹ It has been argued that this *exemplum* comes from Gaius Gracchus’ speech against Marcus Livius Drusus in 122 BCE, the *De Legibus Promulgatis*, but there is little evidence to support the identification: Caplan (1952) *ad loc.* Cf. *ORF* fr. 47 = Gell. *NA* 10.3.

¹³⁰ Martin (2000) 34, 39–40.

¹³¹ Raaflaub (2004) 54–8.

speech (*parrhesia*)' might be seen as celebrating aristocratic *libertas*.¹³² Still, Brunt urges caution in connecting freedom of speech to the elite exclusively, as the evidence is not sufficient.¹³³

Indeed, the evidence of the *Rhetorica ad Herennium* supports Brunt's caution. The Auctor only limits the use of *licentia* with relation to the audience; usually, he says, both the citizen audience and the jury should be feared.¹³⁴ *Licentia* involves a speaker overcoming this barrier to say what must be said. Moreover, the Auctor's use of both invective and *licentia* shows that it cannot be right to associate invective with lower ranked orators or outsiders and at the same time assume that 'abusive freedom of speech' is the privilege of the elite. The implication is that both invective and *licentia* should be considered as part of the range of techniques available to the Auctor's audience of future orators. This conclusion has important consequences for an understanding of Roman oratory in this period and the modes of speech available to orators.

Conclusion

As this chapter has shown, language was a powerful thing in Roman political culture and, according to the Auctor, at least some orators felt they had the right to use it freely. For the Auctor (and his students), this was called *licentia*. There were a variety of voices speaking out at this time, both verbally and in writing, and perhaps an even greater variety of topics on which they could speak. An array of 'bad' behaviours could be denounced in a way that either appealed to the listeners' existing prejudices, or instilled new ones in them. This probably worked differently for different audiences, as the comparison between the *Rhetorica ad Herennium* and the *De Inventione* shows. Nevertheless, this style of criticism was so well received by Roman audiences that examples of invective continued to circulate and new generations of orators could take inspiration from well-worn insults. The exigencies of prosecution and political competition meant that some of these accusations may not have been true, but they were highly persuasive.

¹³² Gildenhard (2007b) 174.

¹³³ Brunt (1988) 314-6.

¹³⁴ *Rhet. Her.* 4.36.48.

There are several similarities between modern theories on hate speech and the role of invective and *licentia* discussed in this chapter. Just like invective, hate speech works by being quoted and re-quoted, inserted into new contexts.¹³⁵ It can be re-used and re-appropriated by the speaker. By citing these examples of invective, the Auctor is giving them a new context and also a new future; he is contributing to the continuing circulation of these ideas and the associated damage that they might do. Hate speech, like invective, had an active impact on the audience. The two work by isolating their object from the larger group; the opponent is humiliated, perhaps laughed at, and made to seem different.¹³⁶ The group itself, the audience, is united.¹³⁷ As E. Kirk Whillock argues, effective hate speech encourages the audience to act out the hate that has been incited.¹³⁸ Although less dramatic than this sounds, invective and *licentia* were meant to work in a similar way, in order to persuade an audience to take a particular form of action as an expression of their agreement. The Auctor's invective could be said to 'do violence' to an opponent's reputation, and perhaps to the system as a whole,¹³⁹ yet it was ostensibly for a good cause.

Whether or not the Auctor's invective and promotion of *licentia* should be described as *popularis* is still open to question. The Auctor's exemplary tradition does not fit neatly into either a *popularis* or *optimas* category but then these two categories need not be as mutually exclusive as previously thought. The evidence of the *Rhetorica ad Herennium*, along with the conclusions Robb has drawn from her much wider study of the terms, suggests that a binary model is not flexible enough. Instead, the *exempla* of the *Rhetorica ad Herennium* display what might traditionally be described as *popularis* and *optimas* elements but they do not contradict or nullify one another.

Other *exempla* are not directed at the *Quirites* but the *iudices*, men of the jury, including two *exempla* for *licentia*. In the next chapter I will explore the way in which the Auctor's

¹³⁵ Butler (1997) 14.

¹³⁶ See Corbeill (1996) 5, and generally for the effects of humour/humiliation.

¹³⁷ Kirk Whillock (1995) 36-7.

¹³⁸ Kirk Whillock (1995) 45.

¹³⁹ Gildenhard concludes that invective is 'dysfunctional', 'inherently divisive' and 'the rhetorical equivalent of the suicidal violence of civil conflict': (2007b) 173.

advice helps the reader speak to a more specific audience in a law court and what this reveals about forensic oratory.

Chapter 5: *Pathos* and *maiestas* in criminal trials

The presence of the law in the *Rhetorica ad Herennium* and Cicero's *De Inventione* is such that, in the opinion of J. Harries, they 'read at times like textbooks on law rather than rhetoric'.¹ In the preceding chapters the relationship between the *Rhetorica ad Herennium* and the law has been raised several times. In Chapter 2, the Auctor's theoretical approach to building a forensic case was highlighted by his restructuring of the *constitutiones* ('Issues') into three: Conjectural, Juridical, and Legal. In Chapter 3, several of the *exempla* used by the Auctor referred to legal contexts, including the case of Saturninus and Caepio, which will be discussed further in the current chapter. Yet the treatment of the law and relevant *exempla* is not as systematic as Harries' claim might suggest.

In the tradition of earlier rhetorical handbooks, the *Rhetorica ad Herennium* deals with three different types of oratory. These are Judicial oratory, which takes place in the law courts of the forum; Deliberative oratory, which is performed in the senate either for or against a course of action; and Epideictic oratory, intended to praise or censure an individual. These three categories do not receive equal treatment in the text. In fact, over half the *Rhetorica ad Herennium* focuses on the first type of oratory designed to be spoken in a legal context and the Auctor notes that, by contrast, the Epideictic style is rarely used on its own.

The Auctor explains his focus on Judicial oratory by saying that 'the Judicial is by far the most difficult' of all the types.² He does not explain this claim, but the Judicial context is certainly more nuanced than the tripartite division allows. As the Auctor defines it early in Book 1, Judicial oratory comprises either *accusatio* or *petitio cum defensione*,³ translated by Caplan as 'criminal prosecution or civil suit and defence'. Thus Judicial oratory might refer to advocates speaking in cases brought under what might be called criminal law (*ius publicum*) or civil law (*ius civile*).

¹ Harries (2006) 93.

² *Rhet. Her.* 2.1.1: *multo difficillimum iudiciale est*.

³ *Rhet. Her.* 1.2.2.

Scholars also refer to criminal law as ‘public’ law because of its Latin name and because it often deals with matters of interest to the wider community. This is then opposed to ‘private’ law (rather than civil law) referring to the affairs of private individuals. But neither pair of terms perfectly translates the Roman understanding of the division between the two and there are exceptions on all sides. For example, some things that might now be termed ‘crimes’, such as theft, are part of the *ius civile*, while succession and wills were tried in the *iudicia publica*, the ‘public’ courts.⁴ Two other issues are the lack of a state prosecution service and the open (that is, public) setting of all courts in the forum. Therefore, while recognising the on-going difficulties, I will use the pairing criminal and civil to refer to the courts in these chapters.

Indeed, although the Auctor sees no problem with treating the two together indiscriminately, for historical purposes it is important to recognise their significant differences in areas such as procedure, personnel and frequency. Criminal law was defined by statutes and, by the Auctor’s time, trials were commonly held in a *quaestio* or standing court (less often in the older form of *iudicium populi*) and judged by a panel of jurymen.⁵ By contrast, the urban praetor re-defined civil law each year through his edict and he would approve cases himself in the first stage (*in iure*) of the civil law process. After the praetor had appointed the single judge (*iudex*), a case would proceed into the second stage (*in iudicio*) to be heard.⁶ Owing to the nature of the sources, which focus on high-profile political cases, the majority of recorded cases relate to trials in *quaestiones* where ex-magistrates would be charged for extortion (*de repetundis*) or electoral bribery (*de ambitu*). Only three definite civil suits appear in the *Trials of the Late Roman Republic* between 100-90 BCE; yet these trials would have been far more commonplace as they involve disputes about land and inheritance.⁷

The Auctor does not discuss these differences, which may seem strange, but, as scholars such as Riggsby have argued, he is not unusual in not examining more closely the idea of

⁴ For criminal law, see Jones (1972) 45; Cloud (1994) 494-505; Robinson (1995); Riggsby (1999); Lintott (2004) 61-2; Fantham (2004) 121-30; Harries (2006) 59-66.

⁵ NB. A *quaestio* can also be called a *iudicium publicum*. For legal procedure of both criminal and civil trials see Lintott (2004). See Chapter 1 for the development of the *quaestio* system.

⁶ For the legal procedure of civil trials see Crook (1994); Metzger (1997), (2010).

⁷ *TLRR* 76 (civil suit against Gaius Titinius); *TLRR* 85 (possible civil case prosecuted by Publius Sulpicius Rufus); *TLRR* 93 (*causa Curiana*); *TLRR* 99 (civil suit for repayment of debt against unknown).

the *iudicia publica* or the criminal laws surrounding them.⁸ In theory both criminal and civil trials were grounded in and guided by laws but criminal law is also glossed over by other teachers of rhetoric as well as jurists, who do however talk about civil law. For Riggsby, the rhetoricians' lack of engagement with criminal law is 'a feature of the culture which demands comment in its own right'.⁹ Elsewhere, Riggsby suggests explicitly that criminal trials are 'less "legal" institutions' than civil';¹⁰ Harries also notes that many criminal cases would not have involved complex legal disputes.¹¹

Whether consciously or not, the Auctor's representation of criminal and civil law situations reflects the differences that scholars have observed elsewhere. In this chapter I will examine the way that the Auctor presents criminal trials as dominated by emotional appeals, and the implication that having to define or interpret a law was unusual for an orator in a criminal trial. In the next chapter, I will turn to civil trials where knowledge of the law and interpretation plays a much more important role for the Auctor.

There are two features of the *Rhetorica ad Herennium* that can be securely identified as relating to a criminal law context in particular. The first is a number of *exempla* that, unlike many of the *exempla* in the text, can be contextualised. There are sixteen *exempla* in the text that contain a reference to the *iudices*, 'men of the jury', and in this chapter I will treat them together as a group. These sixteen *exempla* make up around 6% of the total number of *exempla* (c.250) within the *Rhetorica ad Herennium*. These *exempla* highlight the use of emotional appeals or *pathos* as a common and effective strategy for persuading the *iudices*. By contrast, there is no evidence for the use of legal arguments in these *exempla*. I will discuss this in the first part of the chapter.

In the second part of the chapter I will focus on the Auctor's approach to defining *maiestas*, which seems at first to contradict the focus on *pathos* elsewhere. *Maiestas* recurs several times in the *Rhetorica ad Herennium* in the context of the trial of the younger

⁸ Riggsby (1999) 164-7: criminal offences are not discussed *qua* criminal offences.

⁹ Riggsby (1999) 168. See also Crook (1995) 20: 'proof was not in order to convince but to persuade: it was 'global' – to produce a general climate of sentiment in favour of one's client – and so a mélange of argument and testimony, fact and law.'

¹⁰ Riggsby (1999) 2.

¹¹ Harries (2006) 96.

Quintus Servilius Caepio for his physical attack on Saturninus' preparations for a vote on his corn law. *Maiestas* is also a prominent feature of the *De Inventione* and Cicero's later *De Oratore*, which is set in 91 BCE. By studying these texts, I will show that the approach to *maiestas* in each of them reflects the fact that the *lex Appuleia de maiestate* that founded the *quaestio* for *maiestas* was badly defined. The response of the rhetorical handbooks suggests that this situation was extraordinary and challenged the orator to work with the law in a way that he would not usually.

Before beginning, it is worth noting that the Auctor does refer to other examples of criminal law during the course of the *Rhetorica ad Herennium* that I will not discuss directly in this chapter. Another way to examine the *exempla* regarding Saturninus and Caepio would be as a case study of the legislative process and the role that the senate and magistrates played in passing and obstructing new laws at the time. The Auctor also refers to specific criminal laws in order to illustrate the Legal Issue of Conflicting Laws (*ex contrariis*).¹² The conflicting laws in question relate to an event that is thought to be historical,¹³ when an augur spoke before a *contio* despite a law forbidding men convicted of extortion to do so. In doing this he was obeying a different law stipulating that a man seeking to be an augur must be named by an existing augur in the *contio*. The first law is thought to be that of Gaius Servilius Glaucia *de pecuniis repetundis*, 111 BCE,¹⁴ and the second of Gnaeus Domitius Ahenobarbus *de sacerdotiis*, 104 BCE.¹⁵ The reference to these laws and processes suggests the Auctor's awareness of recent legal events, which he may have personally witnessed or known about at the time.

Talking to the *iudices*

In the *Rhetorica ad Herennium*, the *exempla* addressed to the *iudices*, 'men of the jury', focus on creating an emotional response through *pathos* rather than on the legal aspects of a case. Other scholars have suggested that the law did not feature as heavily in criminal

¹² *Rhet. Her.* 1.11.20.

¹³ See Caplan (1954) *ad loc.* Marx (1898) 108 suggests c.100 BCE. See *TLRR* 71-2.

¹⁴ Cic. *Balb.* 23.53-24.54, *Rab. Post.* 4.8-9. See Caplan (1954) *ad loc.*

¹⁵ See Chapter 3, n. 122 for further references.

trials; the evidence from the *Rhetorica ad Herennium* supports this and illustrates the alternative ways these trials were being argued in the early first century BCE.

The references to the *iudices* take the form of an apostrophe,¹⁶ near the beginning of an *exemplum*, and serve to address the jurymen directly. The plural form of *iudices* in these *exempla* indicates that the speech comes from a *quaestio* or *iudicium populi* rather than from a trial before a single judge (*unus iudex*).¹⁷ Some civil trials could involve a number of personnel, such as the process *apud recuperatores* (before the ‘recoverers’ in trials concerning property) or the *consilium* (‘advisory board’) that a single judge might also have. However, the evidence from the few surviving civil speeches by Cicero suggests that these men would not be described as *iudices*.¹⁸ Therefore, when *exempla* refer to the *iudices* it is most likely that they refer to a criminal trial.

All but one of the *exempla* come from the final book about Style and they are intended to show how best to adorn a speech with rhetorical techniques. Hence the Auctor has chosen to use them as positive recommendations and promotes the approach that they exemplify. As with the other *exempla* from the text, it is difficult to be certain whether they are taken from real speeches, invented by the Auctor himself, or perhaps adapted by him. However, they are clearly intended to resonate with the audience as resembling or representing genuine oratory and, as the Auctor tends to use *exempla* from the recent past,¹⁹ probably also come from – or take their inspiration from – the previous fifty years.

As I discussed in Chapter 1, the constitution of the juries was a political issue throughout this time and Gruen argues that the trials themselves became increasingly politicised too.²⁰ Particularly after the controversial murders of the tribune Tiberius Gracchus in 133 BCE

¹⁶ See *Rhet. Her.* 4.15.22 for the Auctor’s discussion of this technique (Apostrophe, *exclamatio*), which ‘expresses grief or indignation’. Cicero’s use of the apostrophes ‘*Quirites*’, ‘*iudices*’, and ‘*recuperatores*’ has been noted in previous scholarship: Frier (1985) 197; Leovant-Cirefice (2000); Wisse (2007) 39. Wisse calls this a ‘transition marker’ (noting six uses in the *Pro Milone*), and Frier refers to the direct addresses which ‘punctuate the stages in [Cicero’s] speech’ (at 22 points in the *Pro Caecina*). Leovant-Cirefice has gone further, arguing that the address serves to unify a potentially diverse audience: (2000) 49.

¹⁷ For which, see Kelly (1963) 112–33; Metzger (1997). NB. Tellegen-Couperus (2007) argues that they should not be considered ‘laymen’.

¹⁸ From examination of Cic. *Quinct.*, *Q Rosc.*, *Tull.*, *Caecin.*, in which the term does not appear.

¹⁹ See Chapter 3.

²⁰ Gruen (1968b) esp. 6–7.

and his brother Gaius in 121 BCE, trials became a place where political opponents could damage each other's reputation and force them into exile or even to commit suicide.²¹ Before his death Gaius Gracchus was influential in passing a law that gave equestrian men control of the juries,²² where previously higher-ranking senators had taken this role. Hence this law made the lower-ranking equestrians the arbiters of senatorial behaviour while also stipulating that the equestrians themselves were not liable for prosecution in the same court.

After Gaius Gracchus' legislation in 123-2 BCE there was a period of stability in the courts, in which equestrians continued to act as *iudices* in the permanent and extraordinary *quaestiones*.²³ However, Quintus Servilius Caepio (the Elder) challenged this in 106 BCE and Servilius Glaucia responded two years later, reaffirming the equestrians' position. The issue came to the fore once again in 91 BCE when the tribune Marcus Livius Drusus attempted to introduce further legislation *de repetundis* and towards the end of the Social War in 89/88 BCE Plautius Silvanus, another tribune, changed the situation again.²⁴ After the *Rhetorica ad Herennium* had been written, Sulla enrolled 300 equestrians into the senate (around 81 BCE) and gave these new senators the responsibility of the courts. This situation lasted just over a decade, until the time of Cicero's well-known speech against Verres in 70 BCE. In that speech Cicero is addressing a senatorial jury who are threatened by a new piece of legislation, which would give the equestrians access once more.²⁵

For several decades before the Auctor was writing, then, the juries had mainly been staffed by equestrians, but that had recently changed to a mixed system. The *Rhetorica ad Herennium* demonstrates how an advocate would speak to this particular audience. To some extent, the approach of the advocates represented in the Auctor's *exempla* is rather practical and they outline the responsibilities of the *iudices* as might be expected. The men of the jury were told to examine the evidence available from witnesses and confessions

²¹ See Gruen (1968b) 45-105.

²² Gruen (1968b) 87-91.

²³ Gruen (1968b) 106-35.

²⁴ See Suarez Piñero (2000) 259-65 for a convenient summary of the developments described. See also Balsdon (1938); Gruen (1968b) 158-9, 165-7, 207-9, 221; Weinrib (1970); Sherwin-White (1972); Griffin (1973).

²⁵ McDermott (1977) for a discussion of 'The Verrine Jury' specifically.

under torture.²⁶ But the *exempla* also suggest that jurors should pay attention to public opinion (*rumor populi*), which, as one *exemplum* says, is ‘formed from evidence’ and ‘must be true’.²⁷ Hence public opinion is presented as a pre-existing factor that is unconnected to the trial itself; it requires the audience to draw on their own prior knowledge and preconceptions. Another *exemplum* again makes clear that the jurors should draw on their own opinions of the wider community:²⁸

Men of the jury, I have often noticed that many men seek protection for themselves through some honest deed, which even their enemies could not bring to charge. Yet my opponent can do nothing of the sort. Will he take refuge in his father’s merit? But you have sworn an oath and condemned that man to death. Or will he turn to his own former life, conducted honestly elsewhere? But you all know the way that this man has lived before your very eyes.

In this *exemplum*, the speaker assumes that the jurors are aware of the defendant’s family history and refers to a previous legal case involving his father. The speaker also makes clear that he disapproves of the defendant’s character and expects the jurors to do the same with full knowledge of the man’s life ‘lived before your very eyes’.

The public life of a defendant is an important consideration for the jurors in at least two of the *exempla*, then. In the system of the *Rhetorica ad Herennium*, a defendant’s manner of life (*vita hominis*) is one of the arguments an advocate would use to incriminate them and show the likelihood that they committed the crime in question.²⁹ It was a tool used by orators to persuade, prejudice and manipulate their listeners, and for this reason the Auctor and Cicero both recommend its use in the Introduction of a speech to create goodwill or its opposite among the audience.³⁰

²⁶ *Rhet. Her.* 4.40.53–41.53. See also *Rhet. Her.* 2.6.9–7.10, where the Auctor provides arguments for and against the use of these kinds of evidence.

²⁷ *Rhet. Her.* 4.41.53: *quem ex argumentis natum necesse est esse verum.*

²⁸ *Rhet. Her.* 4.24.33: *saepe, iudices, animum adverti multos aliqua ex honesta re quam ne inimici quidem criminari possint sibi praesidium petere. Quorum nihil potest adversarius facere. Nam utrum ad patris sui virtutem confugiet? At eum vos iurati capite damnastis. An ad suam revertetur antiquam vitam alicubi honeste tractatam? Nam hic quidem ante oculos vestros quomodo vixerit scitis omnes.* This *exemplum* also has parallels with a known speech of Gaius Gracchus. The short question and answer are stylistically similar to ‘Where shall I take my poor self, where can I turn? The Capitol? But it is steeped in my brother’s blood. Home? So I can see my poor mother crying and despairing?’ (*quo me miser conferam? quo uertam? in Capitoliumne? at fratris sanguine madet. an domum? matremne ut miseram lamentantem uideam et abiectam?*; Cic., *De or.* 3.55.214; Quint. *Inst.* 11.3.114–15). The context of the speech is not known but its appearance in later rhetorical works shows its endurance in the tradition. For the Auctor’s discussion of Reasoning by Question and Answer (*rationatio*) see *Rhet. Her.* 4.16.23. The Auctor describes this as a Figure (*exornatio*) that can hold the audience’s attention.

²⁹ *Rhet. Her.* 2.3.5.

³⁰ *Rhet. Her.* 1.4.8–5.8; Cic. *Inv. rhet.* 1.16.22. See Chapter 4 on invective.

The Auctor goes into further detail when applying Invention to the Epideictic (*demonstrativum*) kind of cause. The Epideictic cause, the Auctor notes, is rarely used by itself but makes up ‘great parts’ (*magnae partes*) of Judicial and Deliberative causes.³¹ The Auctor explains that the virtues and flaws of a person’s character should be outlined first and then the speaker can show how someone with such a character has used their physical or external advantages or disadvantages.³² Again, the implication is that a person’s character influences their behaviour. The Auctor does not explain why this makes a good argument, but Cicero justifies his use of a person’s character, nature or way of life as evidence in several places in the *De Inventione*.³³ The most important reason is the effect it has on the judges: ‘many suspicions can be drawn from a person’s way of life’.³⁴ As a result, it was easier to suspect someone’s motive for a crime if they already had a tarnished reputation.³⁵

In practice, descriptions of the character of the accused (and the accuser) often appear in Cicero’s speeches, where they used to be considered a kind of ‘calculated irrelevance’.³⁶ However, more recently the significance of the argument for Roman juries has been better appreciated; M. Alexander put it simply: ‘the ancient standards of relevance may have been different from prevailing standards today’.³⁷ Riggsby has argued that the confidence of the Romans in their juries’ verdicts must mean that arguments based on character were also relevant, leading to valid judgements on the crimes committed.³⁸ Elsewhere, Riggsby further argues that juries expected these kinds of arguments, which helped non-experts draw conclusions.³⁹

This also provides the background to another notable feature of these *exempla*: the speakers do not encourage the jurors to consider the law. To some extent, the identity of the jurors themselves may have been influential in this strategy. Whether senators or

³¹ *Rhet. Her.* 3.8.15

³² *Rhet. Her.* 3.7.13

³³ E.g. *Cic. Inv. rhet.* 1.16.22, 2.9.29, 2.13.42.

³⁴ *Cic. Inv. rhet.* 2.9.29: *ex victu multae trahuntur suspiciones*. Cf. 2.9.30- 2.13.43.

³⁵ *Cic. Inv. rhet.* 2.10.32

³⁶ Crook (1995) 143. For a summary see Alexander (2002) 31-5.

³⁷ Alexander (2002) 33.

³⁸ Riggsby (1997). See also Riggsby (2004) 165-85.

³⁹ Riggsby (2004).

equestrians (as for the most of the relevant period), the men who acted as jurors in the case were not chosen as legal experts,⁴⁰ which may have encouraged the use of emotional appeals, as discussed below.⁴¹

The limited scope and number of these *exempla* cannot prove that the advocates in these cases, if indeed they are real ones, did not refer to the law elsewhere in their speeches.⁴² Yet the evidence suggests that the Auctor did not consider those sections to be rhetorically effective; references to the law do not overlap with persuasive parts of a speech. There are examples of speeches where the law is not referred to at all, such as the *Apology* (*Apologia* or *Pro Se De Magia*) by Apuleius of Madaurus from the imperial period.⁴³ Perhaps it is no coincidence that Apuleius actually mentions the trial of Norbanus, contemporary with the *Rhetorica ad Herennium*, in his *Apology*.⁴⁴ In providing models for his readers, the Auctor has not chosen, adapted or created *exempla* that combine legal arguments with Figures of Speech, implying that they do not fit with his definition of Style as ‘the adaptation of appropriate words and thoughts to the case’.⁴⁵

Despite this, the lack of reference to the legal context is surprising when compared to a passage in Cicero’s *De Inventione*. Cicero is discussing arguments for upholding the letter of the law as opposed to the intention or spirit of the law. He goes into some detail about how the law affects the jurors and argues convincingly that they rely upon it.⁴⁶

Then [the advocate will say] that the means for the jurors to judge and the other citizens to live will be confused, if they once depart from the laws. For the judges will not have anything to follow if they depart from what is written, and nor will they

⁴⁰ Frier (1985) 199-201 for the normal process of selecting *iudices* and the different procedure for selecting *recuperatores*; Harries (2004) 150. See Cicero’s discussion in *Planc.* 62.

⁴¹ Harries (2004) 149.

⁴² According to Cicero (*Brut.* 207), multiple advocates were not as common in this earlier period as they later became. With Cicero’s own speeches, however, it is important to remember that more ‘legal’ arguments may have been made by the other speakers. See Crook (1995) 127-8.

⁴³ See Harrison, Hilton and Hunink (2001); Hunink (1997). With thanks to the audience at the *Fragments, Holes and Wholes* conference in Warsaw, June 2014, for this connection.

⁴⁴ *Apul. Apol.* 66. The Norbanus trial will be discussed further below.

⁴⁵ *Rhet. Her.* 1.2.3: *idoneorum verborum et sententiarum ad inventionem adcommodatio*.

⁴⁶ *Cic. Inv. rhet.* 2.45.131-2: *deinde et ipsis iudicibus iudicandi et ceteris civibus vivendi rationes perturbatum iri, si semel ab legibus recessum sit; nam et iudices neque, quid sequantur, habituros, si ab eo, quod scriptum sit, recedant, neque, quo pacto aliis probare possint, quod contra legem iudicarint; et ceteros cives, quid agant, ignoraturos...an se legibus obstrictos in tantis molestiis esse aequum censeant, adversarios nostros leges neglegere concedant?* See Burnand (2000) 75-145 for the roles an orator could assume in court as presented in later Ciceronian evidence, including the relationship of jurors and advocates with the law.

be able to gain approval from others for the verdict which they have decided against the law. Other citizens will not know what to do...

The passage continues to discuss the practical details of a juror's involvement in the trial such as swearing an oath and being punctual. Cicero ends his argument by saying:

Do [the men of the jury] believe that it is fair for them to be bound by the laws in so many annoying ways, but allow our opponents to ignore the laws?

In this section, in order to support a particular argument, Cicero shows how the life of a juror could be interpreted as very much influenced and bound by a concern for the law. By contrast, when the letter and the spirit of the law are compared in the *Rhetorica ad Herennium*, the parallel remark is left as an open question: 'What would be appropriate for the juror to follow – something carefully written out, or something cleverly contrived?'⁴⁷ Using the singular *iudex*, the *Rhetorica ad Herennium*'s vague remark could also apply to civil trials as well as criminal ones. The Auctor does not place the same emphasis as Cicero on the need for jurors to consider the law in order to win approval and provide guidance for fellow citizens, not only during the trial but beyond it too. Despite the lack of legal expertise among jurors, then, Cicero's argument suggests that the law could play a significant role in their experience of trials, including their decision-making process and retrospective justification. By contrast, the Auctor chooses not to focus on this aspect in his *exempla*.

In fact, the most prominent feature of the Auctor's group of *exempla* is the advocate's appeal to emotions. As such, they are also examples of the use of *pathos* in these criminal trials.⁴⁸ *Pathos* is not discussed in depth by the Auctor or Cicero in *De Inventione*, as Wisse observes,⁴⁹ but both authors suggest that emotional appeals should be used.⁵⁰ The Auctor includes such themes under the common places of Amplification (*amplificatio*), which is a subsection of Conclusion (*conclusio*).⁵¹ Despite the lack of attention paid to *pathos* formally in the Auctor's rhetorical system, studying these *exempla* addressed to the *iudices* shows the importance of such emotional appeals in practice.

⁴⁷ *Rhet. Her.* 2.9.13: *quid iudicem sequi conveniat, utrum id quod diligenter perscriptum sit, an id quod acute sit excogitatum.*

⁴⁸ Solmsen (1938a); Marchetti (1986); Wisse (1989); Leigh (2004); Arena (2013).

⁴⁹ Wisse (1989) 97. Cf. *Cic. Inv. rhet.* 2.25.

⁵⁰ *Rhet. Her.* 2.30.48–9; *Cic. Inv. rhet.* 1.53.101–54.105.

⁵¹ *Rhet. Her.* 2.30.48–59. The Appeal to Pity (*commiseratio*) follows (2.31.50). See also *Rhet. Her.* 3.15.27 for gestures appropriate to Amplification.

One emotion that the advocate focuses on is love or compassion. In different *exempla*, the men of the jury are asked to base their decision on their love for their country (*amantissimus rei publicae*),⁵² for the senate (*nomen senatus diligit*), or for the equestrian order (*equestrem locum...cupit*).⁵³ In another case, the speaker seeks their sympathy for the defendant's family by emphasising the effect a conviction would have on their 'aged parent' (*grandis natu parens*), 'young children' (*fili parvi*), and 'whole household' (*tota domus*).⁵⁴

But in the majority of *exempla* the speaker wants to arouse fear in their audience, as can be seen from the heightened level of tension, threat and fear that pervades them. To create fear the speakers consistently warn the jurors of the potentially grave consequences of their actions, both for themselves and for Rome.⁵⁵ One such *exemplum* appears at the beginning of Book 4 as a positive illustration of the Auctor's Grand Style of speech:⁵⁶

What did they dare to do, and what can they be planning? How the enemy, after tearing up the graves of our ancestors and throwing down the walls, would rush triumphantly into the city; how the city, after they have plundered the temples of the gods, massacred the best men, taken others into slavery, and subjected matrons and free-borns to the enemy's passion, would be burned and fall in the most violent fire.

In the Latin, this passage is made up of strings of ablative absolutes and only two main verbs describing the enemies rushing into the city (*hostes...inruerent*) and the city falling (*urbs...concidat*). Thus the cumulative threat to graves, temples, women and children is presented as a foregone conclusion and the climactic consequences are inevitable unless the *iudices* act appropriately. The speaker assumes that the *iudices* are great lovers of the *res publica*,⁵⁷ and so makes them responsible for pre-empting the crisis by exiling the traitor, as the speaker suggests.

⁵² *Rhet. Her.* 4.8.12.

⁵³ *Rhet. Her.* 4.35.47.

⁵⁴ *Rhet. Her.* 4.39.51.

⁵⁵ See the fifth and seventh commonplaces of *amplificatio*, *Rhet. Her.* 2.30.48-9.

⁵⁶ *Rhet. Her.* 4.8.12: *Quid agere ausi sunt, aut cogitare possunt? Quo pacto hostis, revulsis maiorum sepulcris, deiectis moenibus, ovantes inruerent in civitatem; quo modo deum templis spoliatis, optimatibus trucidatis, aliis abreptis in servitutem, matribus familias et ingenuis sub hostilem libidinem subiectis, urbs acerbissimo concidat incendio conflagrata.*

⁵⁷ *Rhet. Her.* 4.8.12: *Vos animus amantissimus rei publicae.*

The threat described here and its unwanted consequences look forward to Cicero's *Fourth Catilinarian* (63 BCE), which was also designed to induce fear in its audience and provoke a particular response. The *Fourth Catilinarian* was the final speech of the Catilinarian series in which the consul Cicero tried to persuade the senate that they should vote in favour of capital punishment for the conspirators. As Cicero implied, a wrong decision could spell imminent crisis for the republic, as the senators and Roman people, their wives and children, and the temples and shrines of the gods – in fact the whole country – might be slaughtered, burned and devastated.⁵⁸ There are also echoes of the same idea in Philippus' speech to the senate as recorded by Sallust,⁵⁹ although to what extent the *Histories* (written in the 30s BCE) records the speeches of the 70s BCE accurately is not clear. Nevertheless, these echoes suggest that the threats used to rouse emotions in the jurors of the *Rhetorica ad Herennium* are familiar themes that could be repeatedly exploited during times of crisis.

Indeed, a second *exemplum* from the *Rhetorica ad Herennium* uses the same themes, again with the aim of persuading the *iudices* to exile the accused.⁶⁰ The accused is described as a 'lion' or 'wild beast' who, if freed, will attack property, households and reputations, shaking the *res publica* to its foundations. This *exemplum* is explicit in urging the *iudices* to 'free everyone from fear' (*liberate omnes formidine*), conjuring the emotion by naming it. As this shows, fear is the guiding principle here and the *iudices* become protectors of society rather than guardians of the law. The repetition of the same threats within the *Rhetorica ad Herennium* and later implies that the speakers considered this an effective rhetorical strategy.

As well as these general threats to the *res publica*, the *iudices* are also presented with more personal threats in these *exempla*. The potential consequences for the *iudices* themselves are used as another factor in the speaker's argument. Again, then, the Auctor provides examples of speakers resorting to fear and other emotions instead of using arguments

⁵⁸ Cic. *Cat.* IV 1.2.

⁵⁹ E.g. Sall. *Hist.* 1.67.10.

⁶⁰ *Rhet. Her.* 4.39.51. See also the third *exemplum* in the same section, beginning '*nam neminem vestrum fugit...*'. David discusses this as a possible response to the Latin rhetors: (1979) 164.

based on the law. The *exemplum* above goes on to describe how the accused would also turn against the *iudices* in the event of acquittal:⁶¹

For if you let this man go unpunished, then believe me, it is against yourselves, men of the jury, that you will have let loose a wild and ferocious beast.

This ‘wild beast’ (*fera bestia*) does not seem to refer simply to the defendant any more, but presents a vague threat perhaps encompassing public opinion or something else entirely. The speaker tells the *iudices* in no uncertain terms that they will also be vulnerable if they make the ‘wrong’ decision. The speaker manipulates their emotions, induces fear and relies on their instinct for self-preservation.

In another *exemplum* the *iudices* have already suffered negative consequences and the speaker uses this to emphasise the reality of future threats. The *exemplum* illustrates Frankness of Speech (*licentia*) and the passage comes from a part of the legal process called *ampliatio*.⁶² In an *ampliatio* the case is heard for a second time following a *non liquet* judgement, where the *iudices* have not come to a clear decision. The speaker berates the jurors for not condemning the defendant in the first instance and highlights the lack of logic in their attempt to avoid being thought cruel:⁶³

While you escaped that censure, which was distant from you, you discover this one near at hand: that you are thought cowardly and afraid. Although you have endured great misfortunes in public and in private, now when even greater ones seem to loom, you sit and yawn.

In this section of the speech there are two aspects clearly intended to sway the *iudices*. The first is that as a result of their previous *non liquet* judgement, they are thought to be ‘cowardly and afraid’ (*timidi atque ignavi*). It seems that public opinion, or at least the public that is aware of the trial, is now against them as a result of their judgement, and this is seen as significant – almost as significant as being considered cruel. Secondly, the great misfortunes (*maximae privatae et publicae calamitates*) that they have suffered publicly and privately (and will continue to suffer) are used to try and motivate them towards a different response. The speaker does not go into detail about the ‘great misfortunes’, which

⁶¹ *Rhet. Her.* 4.39.51: *nam si istum inpunitum dimiseritis, in vosmet ipsos, mihi credite, feram et truculentam bestiam, iudices, immiseritis.*

⁶² See Chapter 4 for further discussion of *licentia*.

⁶³ *Rhet. Her.* 4.36.48: *dum eam vitastis vituperationem, quae longe a vobis aberat, adfuturam eam invenistis ut timidi atque ignavi putaremini. Maximas privatas et publicas calamitates acceptis, cum etiam maiores inpendere videantur, sedetis et oscitamini.*

suggests that the *iudices* and any other audience members watching the trial understood their implications. It may also be that these threats were left intentionally vague so the *iudices* could interpret them in their own way, as with the ‘wild beast’ of the previous *exemplum*.

It might be possible to connect the public misfortunes faced by the *iudices* with the more specific debate about the composition of the juries themselves, which had recently been reignited. The use of ‘*publicae*’ and the assumption that the losses apply to all of the *iudices* could equally suggest that there was a political aspect to this situation. With regard to this, there are parallels between this *exemplum* and the opening of Cicero’s first speech against Verres, which I referred to above. In this speech, Cicero warns the senatorial jury of 70 BCE that they may be endangering their control over the courts if they make the wrong decision.⁶⁴ In this later scenario, the senatorial jurors are made responsible for the wellbeing and reputation of their entire social group, and for maintaining the status quo. The *exemplum* in the *Rhetorica ad Herennium* may be evidence of an earlier manifestation of the same debate in the courts. More precisely, it is possible that the same arguments, the same tropes, had been used before Cicero employed them in Verres’ trial. Just as the speaker in the *Rhetorica ad Herennium* describes public losses and loss of face, Cicero connects the decision of the Verrine jurors directly to the *auctoritas* of the senate as a whole, which might be damaged.

The lack of detail in the *exemplum* from the *Rhetorica ad Herennium* means that the connection between the *calamitates* and the changing judicial situation cannot be firmly established. The Auctor’s silence about another *exemplum*, which also refers to the composition of the juries, is similarly inconclusive, although the *exemplum* clearly refers to equestrian and senatorial *iudices* on the same jury panel.⁶⁵ This seems to illustrate the recent introduction of mixed juries of senators and equestrians by Plautius Silvanus: the *lex Plautia iudiciaria* of 89/88 BCE.⁶⁶ Although the Auctor does not comment on the debate that must have surrounded this change, he does give his reader and student a strategy for working with the new situation: the use of *pathos*.

⁶⁴ Cic. *Verr.* 1.1.1.

⁶⁵ *Rhet. Her.* 4.35.47.

⁶⁶ See Chapter 1 for a summary of the debate surrounding the judiciary laws.

Just as the Auctor does not comment on whether the fear expressed in these *exempla* relates to the judiciary situation, neither does he choose *exempla* that promote the use of the law as an argument in criminal trials. Nevertheless, the appearance of these *exempla* in the Auctor's fourth book implies that many speeches made in criminal trials were rhetorically successful and memorable because of their use of *pathos*, rather than their engagement with criminal law. More than this, for the Auctor, the appeal to the emotions was often a negative one: the *exempla* present a picture of jurors who were frequently threatened and made to feel terrified. In this way, these *exempla* from the *Rhetorica ad Herennium* not only give an insight into forensic oratory but also a sense of the magnitude of these trials in the Roman Republican context and the tone of public debate in this period.

Describing offences

Pathos was a common and successful method of argument in criminal trials, as shown in the *exempla* above, but the Auctor also returns repeatedly to a case about *maiestas*. The Auctor is not unusual in this; the question of *maiestas* also appears in the *De Inventione* and Cicero's later work, *De Oratore*. As E. Fantham argues, the repeated inclusion of Quintus Servilius Caepio's trial for *maiestas* in the *Rhetorica ad Herennium* and references to opposing definitions of *maiestas* in the *De Inventione* imply that the trial raised 'important new legal issues' in the 90s BCE.⁶⁷ I will argue that *maiestas* presented such a challenge to advocates because they were not used to having to interrogate the laws. Hence the concern about *maiestas* displayed in the texts does not contradict the picture presented above of criminal trials that rarely discussed the laws themselves. In this section I will compare the presentation of *maiestas* and the language used by Cicero and the Auctor to discuss what this can reveal about trials *de maiestate* and forensic oratory in criminal trials more generally.

⁶⁷ Fantham (2004) 125. See Cic. *Inv. rhet.* 2.17.53. Gundel (1963) and Bauman (1970) take a historical view of the concept. Galbraith (2004) 182-224 examines Saturninus' *maiestas* law and its relationship to the *populus*, also with reference to the Norbanus trial in Cicero's *De Oratore*.

The Auctor and Cicero in *De Oratore* focus on two different trials under the law of *maiestas* that was passed by Lucius Appuleius Saturninus during one of his tribunates in 103 or 100 BCE.⁶⁸ The *lex Appuleia de maiestate* set up a *quaestio perpetua* to deal with offences involving *maiestas populi Romani minuta*, ‘damage to the dignity of the Roman people’.⁶⁹ The wording and details of the law are not known, but the potential for dispute over its definition and interpretation suggests that it was rather vague and ill-defined as Fantham notes.⁷⁰ This was the second permanent *quaestio* to be established, following the first *de repetundis* (for extortion) established in 149 BCE, unless there was a *quaestio de ambitu* (for electoral bribery) in place by this time as might be suggested by a series of trials in 116 BCE.⁷¹ The trials for *maiestas* discussed by Cicero and the Auctor are intrinsically connected, so it will be useful to discuss their historical context together.

The background to these trials can be traced to 105 BCE, when Quintus Servilius Caepio (the Elder) abandoned his army after a major defeat in Arausio.⁷² In 103 BCE, the tribune Gaius Norbanus led a protest against this defeat and the protest became violent.⁷³ Among other things, it resulted in the *princeps senatus* Marcus Aemilius Scaurus being hit on the head by a stone.⁷⁴ A year or so later, during a tribunate of Saturninus, Caepio the Younger violently obstructed voting on a corn law that Saturninus had proposed to reduce the price of grain. This disturbance is discussed in the *Rhetorica ad Herennium*.⁷⁵

It was not until several years after these events that Titus Betutius Barrus prosecuted Caepio the Younger in 95 BCE on the charge of *maiestas*; Caepio was defended by (the

⁶⁸ Most likely 103 BCE, see *MRR* 1.563, 565 n.4.

⁶⁹ Fantham (2004) 34.

⁷⁰ Fantham (2004) 122 (see also 123–30). Bauman (1970) 54 argues that the law must have ‘set out a detailed category of acts’, as for example the judiciary law of Gaius Gracchus did, although the key phrase *maiestatem minuere* was not defined (Bauman also declines to define *maiestas* himself, describing it as ‘not an absolute quality but a relationship’: [1970] 1). Seager (2001) uses *D.* 48.4.7.3 and *D.* 48.4.4.pr to argue that some specific examples of improper conduct may have been included in the law, although *seditio* would not have been. Harries discusses the acknowledged limitations of written law more generally: (2004) 156–7.

⁷¹ Gruen (1968b) 124. These were the trials of Marcus Aemilius Scaurus, Publius Rutilius Rufus and Gaius Marius.

⁷² Sall. *BJ* 114; Livy *Ep.* 67; Dio Cass. *fr.* 98 (91); Plut. *Luc.* 27. There is a reference to his trial at *Rhet. Her.* 1.14.24. Gruen (1966a) 43–4 argues that Norbanus and Caepio both committed their offences in 103 BCE and were brought to trial in 95 BCE, which is the date tied to Caepio’s trial by Crassus’ consulship in Cic. *Brut.* 162 (following Badian).

⁷³ Cic. *De or.* 2.47.197. Badian (1957), (1983); Münzer (1932).

⁷⁴ For more on the career of Aemilius Scaurus before and after this episode, see Bates (1986).

⁷⁵ *Rhet. Her.* 1.12.21, see below for discussion.

consul) Lucius Licinius Crassus.⁷⁶ Also around this time, a young Sulpicius Rufus brought Norbanus to trial on the same charge for creating the earlier disturbance. Marcus Antonius defended Norbanus (who had been his quaestor) as detailed in the *De Oratore*. Cicero describes Antonius as ‘*censorius*’, dating the trial to after his censorship in 96 BCE.⁷⁷ The Auctor does not mention the significant delay between Caepio’s attack and his prosecution in the mid-90s BCE. For modern scholars the delay has been quite difficult to explain and the Auctor’s lack of discussion might seem strange.⁷⁸ To him and his audience, however, it seems that no further explanation was needed; it must have been obvious at the time.

In the intervening period, it seems that two other trials on the charge of *maiestas* may have occurred. Gruen conjectures that the tribunes Sextus Titius and Gaius Appuleius Decianus were charged in two lesser-known *maiestas* trials, both for activities that connected them to Saturninus in some way.⁷⁹ Titius was punished for having a statue of Saturninus in his house and the shared *nomen* between Decianus and Saturninus imply a relationship there too.⁸⁰

The Auctor does not mention these trials, or the trial of Norbanus, although the elder Caepio’s earlier defeat and trial are discussed and treated somewhat sympathetically.⁸¹ Similarly, *De Oratore* does not mention the younger Caepio or his trial. Cicero’s focus on Norbanus rather than Caepio in the text has been attributed to the presence of Catulus in the dialogue, who was Caepio’s brother-in-law.⁸² There may be a similar reason for the Auctor’s silence, or something else entirely. It may even be that the Auctor favoured Caepio’s trial because of the involvement of Crassus, whom he mentions or quotes several times elsewhere in the text. The Auctor is also sympathetic to Saturninus,⁸³ so this too might be a factor in his decision to focus on this trial.

⁷⁶ *TLRR* 88, with further references.

⁷⁷ Cicero’s Antonius describes his defence at *De or.* 2.47.197-50.201; for the description ‘*censorius*’ see 2.48.198.

⁷⁸ See Gruen (1966b); Badian (1983).

⁷⁹ Gruen (1966a) 38; see *TLRR* 80 and 81.

⁸⁰ Brunt (1971a) 100. Fantham suggests there may have been very few *quaestiones* of any kind during this period. The speakers of *De Oratore* rarely discuss *quaestiones* and this could reflect the lack of other high-profile cases besides those of Norbanus, Caepio, and Publius Rutilius Rufus *de repetundis*: Fantham (2004) 123.

⁸¹ *Rhet. Her.* 1.14.24.

⁸² Fantham (2004) 125.

⁸³ As discussed in Chapter 3 with other tribunes.

The first *exemplum* relating to Caepio in the *Rhetorica ad Herennium* describes the incident in 103 BCE.⁸⁴ It is an illustration of the topic of Definition (*definitio*) and the term to be defined is *maiestas* itself. This embellishment of the story by the Auctor helps his reader to form an opinion about the issue of Definition.⁸⁵

When Lucius Saturninus was about to bring a grain law about the five-sixths *as*, Quintus Caepio, who was city *quaestor* throughout that time, told the senate that the treasury could not support such a largess. The senate decreed that, if he were to bring the law before the people, he would be seen to do so against the *res publica*. Saturninus began to bring the law. Colleagues vetoed, nevertheless he brought down the voting urn. Caepio, as he saw him, against the vetoes of his colleagues, acting against the *res publica*, launches an attack with the ‘good men’. He destroys the bridges, throws down the ballot boxes, and is an obstruction so that the law cannot be brought. Caepio is summoned to trial for *maiestas*.

The background is explained straightforwardly with reference to Caepio’s address to the senate and the senatorial decree against Saturninus. When the Auctor comes to describe Caepio’s actual attack, he uses language reminiscent of the military sphere: *cum viris bonis impetum facit* (‘he launches an attack with the ‘good men’’). The account then gathers pace with three very short phrases describing the action that followed: ‘he destroys the bridges, throws down the ballot boxes, and is an obstruction’. While Saturninus is presented as quite clearly ignoring the senate’s decree, Caepio’s destruction of the hard-won voting bridges and urns is also significant, as they were symbolic of the people’s right to vote and exercise their political rights (however limited). The potent symbol of the voting-urns had appeared alongside Roma and Libertas on coins in circulation from the 120s BCE onwards.⁸⁶



Figure 1: Coin from 126 BCE showing a voting-urn behind Roma's head on the obverse. (c) The Trustees of the British Museum.

⁸⁴ See *MRR Suppl.* 21 for the arguments in favour of dating of the law to this year, with further references.

⁸⁵ *Rhet. Her.* 1.12.21: *cum Lucius Saturninus legem frumentariam de semissibus et trientibus laturus esset, Q. Caepio, qui per id temporis quaestor urbanus erat, docuit senatum aerarium pati non posse largitionem tantam. Senatus decrevit, si eam legem ad populum ferat, adversus rem publicam videri eum facere. Saturninus ferre coepit. Collegae intercedere, ille nihilominus sitellam detulit. Caepio, ut illum, contra intercedentibus collegis, adversus rem publicam vidit ferre, cum viris bonis impetum facit, pontes disturbat, cistas deicit, impedimento est quo setius feratur.*

⁸⁶ RRC 266/1: helmeted head of Roma with voting-urn behind / Libertas in a quadriga (126 BCE).

The Auctor's first reference to this event is about setting the scene, but he makes an important comment after the *exemplum* that signals the legal dilemma to the reader.⁸⁷

It is a Legal Issue from Definition. For we define the term itself when we examine what 'damaging *maiestas*' is.

This is a clear indication of the challenge that the charge of *maiestas* presented for advocates, in that the *lex Appuleia* did not satisfactorily define what *maiestas* was. As the Auctor presents it here, this meant that in such a trial the speaker had to analyse and define *maiestas* simultaneously for their audience. Their construction of what *maiestatem minuere* was would be judged and either approved or disapproved by the jury, creating a precedent.

When the Auctor returns to Definition in Book 2, he illustrates the way that *maiestas* was (or could have been) defined during Caepio's trial. He gives two opposing definitions from the perspective of the defence and prosecution advocates in the trial – Crassus and Betutius Barrus respectively – recalling the highly charged appeals of both sides. The prosecution says:⁸⁸

He damages *maiestas* who takes away the things that constitute the greatness of the state. What are these, Quintus Caepio? The people's votes and magistrate's counsel. Undoubtedly, you also took away the people's voting rights and the right of the magistrate to counsel when you destroyed the bridges.

And the defence is made to reply, spoken by Caepio in the first person.⁸⁹

He damages *maiestas* who inflicts ruin on the greatness of the state. I have not done harm, but prevented it; for I have saved the Treasury, resisted the fancies of evil men, and I did not allow all *maiestas* to be lost.

In both definitions, the thing to be protected is the *civitatis amplitudo*, translated here as 'the greatness of the state', but this is conceived of in different ways. For the prosecutor,

⁸⁷ *Rhet. Her.* 1.12.21: *vocabulum enim definitur ipsum cum quaeritur quid sit minuere maiestatem.*

⁸⁸ *Rhet. Her.* 2.12.17: *Maiestatem is minuit, qui ea tollit, ex quibus rebus civitatis amplitudo constat. Quae sunt ea, Q. Caepio? Suffragia populi et consilium magistratus. Nempe igitur tu et populum suffragio et magistratum consilio privasti, cum pontes disturbasti.*

⁸⁹ *Rhet. Her.* 2.12.17: *Maiestatem is minuit, qui amplitudinem civitatis detrimento afficit. Ego non affeci, sed prohibui detrimento: aerarium enim conservavi, libidini malorum restiti, maiestatem omnem interire non passus sum.*

the key elements of *amplitudo* are political, the right of the people to vote and the counsel of the magistrate, both of which Caepio denied or obstructed by his actions. For the defence advocate, *amplitudo* rests on economic and moral grounds, so by saving the Treasury's funds and resisting the passions of evil men (*libidines malorum*), Caepio has actually preserved *maiestas*.

On both sides, then, strong claims are made about the consequences of Caepio's actions and two opposing definitions of *maiestas* are presented to the jurors. The *exempla* of speeches given here closely resemble speeches that may have been given; the Auctor thus presents a strikingly realistic scenario.

In *De Inventione*, a case of *maiestas* again appears as an example of Definition, illustrating the contemporary concern around this issue. Cicero cites a different instance where Gaius Flaminius, as tribune of the plebs, was removed from the *rostrum* by his father when he proposed an agrarian law.⁹⁰ His father is charged with *maiestas* (according to Cicero) and the trial turns on whether a father's control over his son (*patria potestas*) can outweigh the power of the people invested in a tribune. In fact, these events had happened in 232 BCE, around 150 years before Cicero was writing, and long before Saturninus' law on *maiestas* existed. Cicero is not quite being historically accurate here,⁹¹ but it demonstrates the influence that recent trials and debates surrounding *maiestas* must have had on Cicero's account.

As Cicero goes on to say in *De Inventione*, the prosecutor ought to define *maiestatem minuire* as whatever reduces the *dignitas* and *amplitudo* of the people's authority (*potestas*) or of those to whom the people granted authority. The defence should say that *maiestas* is damaged when the state is administered without authority. Although *amplitudo* is present here, as it was in the definitions of the *Rhetorica ad Herennium*, the central issue in both definitions is *potestas*. In one, the *potestas* of the people must be defended, and in the other, *potestas* is necessary for the correct management of the state.

⁹⁰ Cic. *Inv. rhet.* 2.47.52. Cf. Polyb. 2.21.7-9; Livy 21.63.

⁹¹ Although see Bauman (1970) 16-33, who argues that *maiestas* was part of the earlier *perduellio* charge and suggests that people may have been tried specifically for *maiestas* in the *comitia tributa* from the third century BCE onwards.

The other reference to defining *maiestas* in the 90s BCE comes from Cicero's *De Oratore*, which was written in 55 BCE but set in 91 BCE immediately prior to the death of Crassus. The text takes the form of a dialogue and it features figures who are familiar from the *Rhetorica ad Herennium*, such as Crassus, Antonius and Sulpicius. Cicero does not follow a strict rhetorical system in the work and criticises his own earlier efforts to do so in the *De Inventione*.⁹² Although the text does cover most aspects of rhetorical theory in some form, the text revolves around the qualities of the ideal orator.⁹³

Knowledge of the law is a key part of the discussion, as the character of Crassus argues that it is essential skill for an orator while the character of Antonius prioritises eloquence.⁹⁴ For example, in support of the argument made in the previous section of this chapter, Antonius says that men are more often swayed by emotions than 'by truth or a regulation, any legal standard or court formula or even the laws'.⁹⁵ However, this is part of Cicero's characterisation of Antonius and should be treated with a certain amount of caution. As Fantham points out, the presentation of Crassus does not fit exactly with other evidence of his legal practice and the same disconnect between Cicero's Antonius and the real Antonius may also exist.⁹⁶ It is in the context of this debate that the discussion of the Norbanus trial should be read.

The Norbanus case is also used to exemplify a form of definition, which Cicero terms 'what it should be called' (*quid vocetur*), that is, 'when the term by which something should be named is contested'.⁹⁷ The significance of the definition for the advocate is emphasised by Antonius, who goes on to say that he allowed much of what Sulpicius had accused Norbanus of, yet 'I denied that *maiestas* had been damaged by him' (*ab illo maiestatem minutam negabam*). Indeed, Antonius says, 'that whole case' (*tota illa causa*) depended on what the word *maiestas* meant in the context of the *lex Appuleia*.⁹⁸ By

⁹² Cic. *De or.* 1.2.5. See May and Wisse (2001) 26-37.

⁹³ May and Wisse (2001) 9-12; Harries (2004) 15, (2006) 109-14.

⁹⁴ Especially: Crassus – Cic. *De or.* 1.36.165-46.203; Antonius – Cic. *De or.* 1.55.234-61.262.

⁹⁵ Cic. *De or.* 2.42.178.

⁹⁶ Fantham (2004) 102. See Harries (2004) for an assessment of Cicero's own knowledge of the law.

⁹⁷ Cic. *De or.* 2.25.107: *cum quo verbo quid appellandum sit contenditur*. Cicero's comments regarding *definitio* in this passage show that the two fulfil the same function.

⁹⁸ Cic. *De or.* 2.25.107. See Fantham (2004) 122.

rejecting the key point that Norbanus had damaged *maiestas*, Antonius argued that he should be acquitted under the *lex Appuleia*.⁹⁹ Antonius criticises strict definitions as *puerile* because they can be picked apart by the opposition and missed by the jurors.¹⁰⁰ Instead of narrowing the meaning of *maiestas*, Antonius says that both he and Sulpicius took the opportunity to expand what *maiestatem minuere* meant with all the force of oratory.¹⁰¹

In a later section, however, Antonius does give an example of a simple definition of *maiestas* that might be used.¹⁰² He says that, if *maiestas* is the *amplitudo* and the *dignitas civitatis*, then it is lessened by the man who hands over the army of the Roman people to the enemy (as the elder Caepio did in his defeat at Arausio) and not by the man who brings this person to the authority (*potestas*) of the Roman people (that is, Norbanus).

But the description of *maiestas*, whatever form it took, was not the sole argument for either speaker in the Norbanus case. In all, Antonius says he treated the ‘theoretical’ (*in arte*) issue of defining the *lex Appuleia* in as few words as possible.¹⁰³ Sulpicius seems to have painted a vivid picture of the violence and destruction Norbanus caused with his protest against the elder Caepio, which made Antonius’ defence of Norbanus look unjustified.¹⁰⁴ Antonius himself chose two different approaches, one that showed the advantages that civil discord had brought to Rome, and another that revived personal hatred against the elder Caepio.¹⁰⁵ Cicero’s Antonius attributes his success to the use of these historical *exempla*, rather than a recasting of the event itself, as he says he defeated Sulpicius ‘more by influencing the minds of the jurors, than by telling them’.¹⁰⁶ In the absence, perhaps, of suitable legal precedents, the *exempla* legitimised Antonius’ interpretation of *maiestas* and helped him to persuade the jurors.

⁹⁹ Cic. *De or.* 2.25.107.

¹⁰⁰ Cic. *De or.* 2.25.109.

¹⁰¹ Cic. *De or.* 2.25.109.

¹⁰² Cic. *De or.* 2.39.164.

¹⁰³ Cic. *De or.* 2.50.201.

¹⁰⁴ Cic. *De or.* 2.47.197.

¹⁰⁵ Cic. *De or.* 2.48.119.

¹⁰⁶ Cic. *De or.* 2.49.201: *ita magis adfectis animis iudicum quam doctis, tua, Sulpici, est a nobis tum accusatio victa*. See also Fantham (1973) and Fortenbaugh (1988) for emotional appeals in the *De Oratore*.

Nevertheless, the implication of Antonius' description seems to be that the ambiguity of the *maiestas* law allowed defendants to be acquitted on a technicality. As seen in each of these three cases, if the defence advocate's interpretation of *maiestas* was accepted, then the defendant would be considered innocent of the charge. The rights and wrongs of the actual act then become irrelevant. Indeed, the equestrian juries acquitted both Norbanus and Caepio.

If the verdicts of acquittal are a result of genuine consideration by the jurors, and not simply based on political motives, then the acquittal of both Norbanus and Caepio shows which interpretation of *maiestas* was most convincing. For the Caepio case, as evidenced by the defence argument in the *Rhetorica ad Herennium*, this would mean that the jurors were more persuaded by the preservation of the Treasury and defeat of rebellious elements than by the protection of the people's right to vote. By contrast, Antonius' definition in the *De Oratore* rested on an appeal to the people's power and authority, both political and military.

These multiple interpretations of *maiestatem minuere* for the same or similar events show how difficult it was for legal experts and orators to reach any concrete conclusions about *maiestas*. The common thread that runs through each of these interpretations is *amplitudo*, which suggests that this word was particularly, perhaps specifically, associated with the idea of *maiestas*. The similarity between all three texts in this instance confirms that this was the accepted language of the time and that they had a common starting point. However, the significance of *amplitudo* is subject to a great deal of manipulation by different speakers.

The repeated employment of *maiestas* as an *exemplum* for the technique of Definition illustrates the on-going ambiguity of the *maiestas* charge. This was not necessarily a negative thing for advocates, as Antonius' success against Sulpicius shows. Advocates could take advantage of the uncertainty to argue convincingly in favour of either side or with different interpretations as their case demanded. The *Rhetorica ad Herennium* airs this possibility clearly by presenting both sides of the Caepio case, even though he might have been expected to sympathise with Saturninus and omit Caepio's plea. In this case

again, the Auctor addresses a contemporary issue in criminal law through his *exempla* and provides his students with a strategy for managing the situation.

Conclusion

Discussing the *maiestas* case is important for understanding the context of the *Rhetorica ad Herennium*, as it provides a snapshot of the response to an issue that did not exist for much longer. In 82-81 BCE Sulla updated the law on *maiestas* and, although Cicero complains that this still did not clarify the law,¹⁰⁷ there is no evidence for any further trials *de maiestate* for twenty years after the trials of Caepio and Norbanus. The next known person to be tried under Sulla's *lex Cornelia de maiestate* is Gaius Aelius Paetus Staienus between 74 and 70 BCE.¹⁰⁸ The Sullan law continued to be employed occasionally throughout the late Republic,¹⁰⁹ but after the first *quaestio de vi* was set up by the *lex Lutatia* in 78 BCE the charge *de vi* was much more common.¹¹⁰ The evidence from the *Rhetorica ad Herennium* and *De Inventione* therefore presents a very contemporary response to new legal and political realities.

The repeated focus on defining *maiestas* in the rhetorical texts studied in the second half of this chapter also implies that this was an unusual situation that students needed guidance

¹⁰⁷ Cic. *Part Or.* 105. Lintott (1968) 118.

¹⁰⁸ *TLRR* 159, with further references.

¹⁰⁹ After Staienus, there are four definite cases of people prosecuted *de maiestate*: Gaius Cornelius (*tr. pl.* 67 BCE) (*TLRR* 209); Gaius Manilius (Crispus?) (*tr. pl.* 66 BCE) (*TLRR* 210); Aulus Gabinius (*cos.* 58 BCE) (*TLRR* 296); Appius Claudius Pulcher (*cos.* 54 BCE, *cens.* 50 BCE) (*TLRR* 344). It is not clear whether the trial of Gaius Antonius (*cos.* 63 BCE) was *de maiestate* or *de vi* (*TLRR* 241). Verres was also threatened with a *maiestas* charge by Cicero prior to the trial in 70 BCE (*TLRR* 179). By contrast, after the first trial *de vi* in 70 BCE (*TLRR* 184) the charge is recorded in 23 cases (*TLRR* 184, 223, 226, 227, 229, 230, 231, 232, 234, 241, 261, 262, 267, 271, 273, 309, 312, 313, 314, 315, 316, 327, 328) with a further possible case (*TLRR* 228). Owing to the dominance of Cicero as a source, these known trials are often clustered around particular events or individuals such as the Catilinarian conspiracy (63 BCE) and the conflict between Clodius and Milo, which ended in Clodius' death in 52 BCE.

¹¹⁰ The circumstances of the first *lex de vi* (when and by whom) are debated, but on Lintott's reading it was the *lex Lutatia*, passed in 78 BCE, that set up the first *quaestio de vi* (Lintott [1968] 122). This *quaestio* dealt with instances of violence against private citizens that could be interpreted as *contra rem publicam*. The *lex Plautia* (or *Plotia*), again according to Lintott, was an extension of this earlier law that made the *quaestio* applicable for any act of violence deemed to be 'against the interests of the state' (Lintott [1968] 122). Before this time, then, when the *Rhetorica ad Herennium* was being written, there was no standing court that would deal with *vis*. Instead, it seems, such acts of public violence or violence against the state were dealt with by the *quaestio de maiestate*. That the later *leges de vi* took over the function of this court seems to be implied by the relative lack of accusations for *maiestas* in the late Republican period (see note above). For example, as Lintott notes, there is no evidence that Milo and Clodius ever accused one another of this charge and *vis* was 'the natural charge to bring for seditious activities' (Lintott [1968] 118).

on. The texts present a fairly standard solution; they all agree that the way to deal with this imprecise law was for an advocate to set out an appropriate definition of their own each time they were faced with this problem (which may not have been very frequently). The technique of Definition may have received a new focus as part of this response.

In turn, this highlights the expectations surrounding criminal law at this time, and comes back to the subject of the first half of this chapter. In the Auctor's presentation at least, criminal trials were places for *pathos* rather than in-depth legal discussion. The somewhat exceptional case of *maiestas* shows that the expectation was for a legal framework that functioned unobtrusively in the background.

Besides these instances of important contemporary issues, which the Auctor gives guidance on in an indirect way, he does not seem particularly interested in discussing the legal side of public and/or political disturbances in their own right. This is not unusual in comparison to other juristic and rhetorical texts. In the context of a rhetorical handbook, the lack of discussion might imply that the Auctor's audience were already familiar with the well-known events and debates surrounding them, or it might be that the future orator did not expect to deal with criminal law in detail (as suggested in this chapter). Another alternative, by no means mutually exclusive to either of the above, is that the Auctor and other rhetoricians saw no place in a rhetorical handbook for such information, and chose to prioritise the practical rules of composing and performing a speech instead.

The attitude of orators towards the law in criminal trials may also reflect the lack of legal experts, or jurists, in the field of criminal law. Jurists were only consulted about civil law, and I study the Auctor's different approach to civil law and civil trials in the next chapter.

Chapter 6: Civil law and the jurists

For Cicero, the Legal part of rhetorical theory related specifically to the *ius civile*.¹ Civil law had a dedicated place within the rhetorical system of the *De Inventione* and the parallel section of the *Rhetorica ad Herennium* about the Juridical Issue. So while civil law and criminal law are not formally separated from one another in either text, there are important differences between the two in theory and practice. In criminal trials, ex-magistrates were charged with extortion, bribery or *maiestas* (roughly, ‘treason’), while civil trials, presided over ultimately by the urban praetor, dealt with everyday issues such as inheritance and property rights. In this chapter, I will discuss the approach to civil law in the *Rhetorica ad Herennium* and also highlight the role of the jurists, who are an important factor in understanding the wider context despite being unmentioned in the text.

In contrast to the references to criminal law in the last chapter, which appeared in disparate *exempla* throughout Book 4, there is a greater and more concentrated focus on civil law in certain parts of the *Rhetorica ad Herennium*. It makes sense that civil law has a stronger presence in the text, as civil trials were more common, and the Auctor’s audience were more likely to be involved in them either as individuals or as a starting point for an oratorical career. One particular group, the newly enfranchised citizens of the post-Social War era, might be using the Roman civil law system for the first time to address disputes, not least those arising from the war itself.² Cicero’s evidence suggests that the courts did continue to be active in this period despite the on-going turmoil,³ and several urban praetors, who were responsible for publishing the Praetor’s Edict and overseeing civil law, are also known.⁴

¹ Cic. *Inv. rhet.* 2.21.62.

² In the past, criminal trials in the *quaestio de repetundis* had been an important location for non-Roman oratory, as a successful prosecution in that court was a route to citizenship, see David (1979). Cf. David (1980c), (1983).

³ Cic. *Brut.* 308. Similarly, for the activity of criminal courts see Gruen (1968b) 236, who suggests there were few, and Kinsey (1987), who takes the opposite view on the basis of evidence in Cic. *Brut.* 308-9, *Rosc. Am.* 89-91.

⁴ From 92-82 BCE, Broughton (1968)² 17-74 gives as *praetor urbanus* Quintus Pompeius Rufus (91), Aulus Sempronius Asellio (89), Publius (?) Burrienus (83), Lucius Iunius Brutus Damasippus (82). One or more praetors is also either known or presumed for the remaining years, apart from 87 BCE. However, Brennan (2000) 441 has calculated that three-quarters of praetors 112-82 BCE are missing, compared to only one third after Sulla.

It is in this historical context that B. Frier situates the ‘rise of the Roman jurists’ in his work of the same name. He concludes that jurists would have become increasingly important after the expansion of the citizenship; their learned *responsa* would accelerate the legal process and ease the burden on a now-stretched legal system.⁵ J. Harries disputes the lasting effect of this beyond the death of Quintus Mucius Scaevola (the Pontifex) in 82 BCE, highlighting Cicero’s disdain for jurists in his *Pro Murena* and noting that later jurists are increasingly equestrians with less political influence.⁶ The nature of the *Rhetorica ad Herennium* and its date means that evidence from the text cannot contribute to this wider debate about the longer term fate of the jurists, yet the Auctor’s own knowledge of civil law and the assumptions he makes about the knowledge of his audience mean that some inferences might be drawn about the presence and status of jurists in the immediate aftermath of the Social War. In doing so, I support both Frier’s idea of looking at the impact of the Social War on the legal system (as I have discussed in Chapter 1) and Harries’ statement that the work of the jurists was ‘specialised, but it was also part of the cultural mainstream’.⁷

As I highlighted in the last chapter, the *iudices* or jurors in a criminal trial were not expected to be legal experts and did not have access to the legal knowledge of jurists. By contrast, participants of a civil trial (who came from the same group of elite Romans) could consult jurists, who may also have been regular members of the judge’s advisory *consilium*, although this was not a prerequisite.⁸ In the *De Inventione*, Cicero gives the jurists a great deal of responsibility for defining civil law, and suggests that advocates should expect to argue either for or against their advice in cases based on Legal Issues.⁹

Being consulted about legal questions is one of the three roles typically ascribed to the jurists, as found in Cicero’s *De Oratore*: *cavere, agere, respondere*.¹⁰ This is one of several instances where Cicero describes their role in these terms, as being the drafting of

⁵ Frier (1985) 273-87.

⁶ Harries (2006) esp. 45-9.

⁷ Harries (2006) 13.

⁸ On where and how jurists were consulted, see Tuori (2010). The *iudex* of a private case could have a *consilium*, as could a praetor either *in iure* or in the *iudicia publica*. Frier (1985) 205; Tuori (2010) 56. Cic. *Top.* 65 for late Republican *iudicia privata*.

⁹ Cic. *Inv. rhet.* 1.11.14, 2.22.68.

¹⁰ Cic. *De or.* 1.48.212.

legal documents, acting as advocates, and answering legal queries.¹¹ In reality, jurists could also be many other things including politicians and teachers.¹² For example, although Scaevola's only known appearance as an advocate was the *causa Curiana*, which I will discuss further below, he was the consular colleague of Lucius Licinius Crassus in 95 BCE and he also took over from his relation, the older Quintus Mucius Scaevola (the Augur, *cos.* 117, d. 88), as Cicero's instructor in civil law.

This leads to another contrast between criminal and civil law found in the *Rhetorica ad Herennium*, which is that, while the Auctor used *exempla* relating to criminal law in order to advise his reader on contemporary challenges, his approach to civil law assumes more knowledge on their part. This assumed knowledge is quite specific and relates to procedures and the laws themselves. For a modern reader, the references and *exempla* that relate to civil law are not always easily grasped because of their unfamiliar legal terminology or background. The Auctor allows these sometimes oblique references to stand alone, and it is instead the structure of the rhetorical theory that he seems to have adapted for his audience. By grouping and labelling two of the three possible approaches to a case as the Legal Issue (*legitima constitutio*) and the Juridical Issue (*iuridicialis constitutio*), he makes it clear where arguments based on law (*lex* and *ius*) are located in the system.¹³ This emphasises the Auctor's concern to teach his reader about the rhetorical theory and argument rather than explain the aspects of law. Hence it must be the case that the Auctor assumes his reader is familiar with the linguistic, physical and historical context of civil law and I suggest that this is at least partly due to the readers' past, present or future contact with jurists. Following Cicero's references in the *De Inventione* mentioned above, I hope to suggest that the Auctor's assumptions are part of an on-going dialogue with jurists and juristic texts.

In order to do this, I will first survey the occurrences of these references and *exempla* regarding civil law within the *Rhetorica ad Herennium*. In conjunction with this, it will be useful to study the parallel occurrences in Cicero's *De Inventione*. In the *De Inventione*, Cicero is at times more explicit in his discussion of civil law, in mentioning the jurists and

¹¹ See also Cic. *Mur.* 9.19, 22.

¹² See Frier (1985) esp. 139-96; Harries (2006) esp. 27-50. Bauman's discussion of Scaevola (the Pontifex) is a good case study of the range of roles such a figure could play: (1983) 340-424.

¹³ See Chapter 2.

the Praetor's Edict (as I discuss below); I will compare and analyse the approach of the two authors. Once again, these differences help to highlight the choices and assumptions the Auctor has made in writing his text. Following this, I will return to the jurist Scaevola and his work *De Iure Civili* ('On Civil Law'). Although the work does not survive intact, it was based in large part on the Twelve Tables, and I will examine whether the treatment of civil law in the *Rhetorica ad Herennium* is connected to his presentation.

I will conclude the chapter by asking if anything can be learned about civil law in practice from the *Rhetorica ad Herennium*.¹⁴ I will consider the style and delivery of Cicero's four earliest extant speeches, from civil trials in the 80s and 70s BCE, and compare this to evidence from the *Rhetorica ad Herennium* where the Auctor advises his reader about Grand, Middle and Simple Styles.¹⁵ The style associated with civil law may also be connected to the presence of the jurists, again implying their influence over this branch of Roman legal practice in this period.

Where and What

The *Rhetorica ad Herennium* references civil law in connection with two issues, both of which appear in the first book and are then treated again in Book 2: the issue of *translatio*, and the six parts of *ius*. In this section I will discuss how and why civil law appears at these particular moments and the prior knowledge the Auctor assumes. The Auctor also uses *exempla* from civil law trials throughout the text and I will use inheritance, the subject of the *causa Curiana*, as a case study to show how this specific charge recurs.

By using *exempla*, the Auctor demonstrates his own knowledge and awareness of certain laws, legal aspects or processes, and thereby enhances his own authority as a teacher. Although the Auctor does not explicitly comment on the importance or otherwise of legal knowledge, the display of his own knowledge in this way implies to the reader that it is useful and relevant.

¹⁴ Other useful studies of the law in rhetorical texts include Reinhardt (2003) 53-72; Tellegen-Couperus (2003).

¹⁵ For the Styles themselves, see Chapter 2.

The appearance of such references and *exempla* throughout the *Rhetorica ad Herennium* and *De Inventione* also emphasises the learning they expect their readers to do about civil law. It suggests that they and their audience had access to records and discussions of past civil law cases, information which would probably be held and preserved by the jurists. In practical terms, this information might be transmitted in writing, such as the *De Iure Civili* of Scaevola, or orally: Marcus Antonius in *De Oratore* highlights the memory of a jurist as an enviable skill.¹⁶

Translatio

Translatio, or Transference, is a type of Legal Issue (*legitima constitutio*), which is the second of the three Issues the Auctor treats in the *Rhetorica ad Herennium*.¹⁷ In the Legal Issue, the Auctor discusses cases where there is disagreement about how to interpret a legal document, for example, whether to take legal documents literally, what to do when there are conflicting laws, and how to define laws such as the *lex Appuleia de maiestate*.¹⁸ These same subdivisions are treated separately by Cicero at the end of *De Inventione*, although the content is much the same despite the structural difference.¹⁹ One important contrast is that Cicero gives a long *exemplum* for each subdivision and goes into much greater detail about what might be argued in such a case.²⁰ However, Transference (called *translativa* by Cicero) is treated as a separate Issue altogether in the *De Inventione*, while the Auctor downgrades it to a subdivision.²¹ It is through the Auctor's justification of this decision, which he bases on the legal processes involved, that something can be learned about Roman civil law.

¹⁶ Cic. *De or.* 1.28.128.

¹⁷ See *Rhet. Her.* 1.10.18 and Chapter 2.

¹⁸ As discussed in the previous chapter.

¹⁹ Cic. *Inv. rhet.* 2.40.116-51.154. See Chapter 2.

²⁰ One such *exemplum* about Letter vs Spirit was quoted in the previous chapter: Cic. *Inv. rhet.* 2.45.131-2. Another *exemplum* of this section is the invented law mentioned in Chapter 3. Three of the *exempla* from this section of *De Inventione* are also found in the *Rhetorica ad Herennium* (*Rhet. Her.* 1.12.20 = Cic. *Inv. rhet.* 2.40.116; *Rhet. Her.* 1.13.23 = Cic. *Inv. rhet.* 2.50.148; *Rhet. Her.* 1.11.19 = Cic. *Inv. rhet.* 2.51.153).

²¹ Cic. *Inv. rhet.* 2.19.57-20.61.

Transference arises when the defendant deems the circumstances of the trial inappropriate because of its timing, accuser or judges, and hence argues that the trial should be delayed or transferred. The Auctor acknowledges that this type of argument has a limited use in the Roman legal system:²²

The Greeks use this type of Issue *in iudiciis*, while we commonly use it *in iure*. Nevertheless, we do sometimes use it *in iudiciis*, in this way: if someone is accused of embezzlement...he can say...his case ought to be brought for theft and not embezzlement. For these reasons, this part of the Legal Issue rarely comes *in iudiciis*, because there are the praetor's *exceptiones* in a private action, and anyone who brings a case is dismissed unless they have an action.

Here the Auctor highlights the important distinction between *in iure* and *in iudicio*.

Translators have recognised the difficulty these terms present to a modern reader, and Caplan provides the gloss 'in the proceedings before judges' for *in iudiciis*, and 'before the magistrate's tribunal' for *in iure*. This goes some way to explaining the context of the situation the Auctor is describing, but it does little to actually explain the significance of the *exemplum*.

In fact, *in iure* and *in iudicio* are the two stages of a civil case.²³ In the first stage, *in iure*, the plaintiff brings the charge before the praetor (the magistrate who frequently presided over the *in iure* procedure), and the praetor either grants the action or does not.²⁴ The Auctor is implying that this is the stage at which a Transference would more logically be made in the Roman system. As he goes on to say, at this initial stage the praetor could grant *exceptiones*. These *exceptiones* were objections inserted into the formula by the praetor on behalf of the defence when he granted or refused an action; they had the power to stop a case being taken to the next stage (*in iudicio*).²⁵ The case can only progress if an action (*actio*) is granted *in iure*. At this point the praetor sets out the question (*formula*)

²² *Rhet. Her.* 1.12.22: *Hac parte constitutionis Graeci in iudiciis, nos in iure plerumque utimur. In iudiciis tamen nonnihil utimur, ut hoc modo: Si quis peculatus accusatur ...possit dicere ... secum furti agi, non peculatus oportere. Haec partitio legitimae constitutionis his de causis raro venit in iudicium, quod in privata actione praetoriae exceptiones sunt et a causa cadit qui egit nisi habuit actionem.* The Auctor also goes on to briefly outline the situation in the *quaestiones*. Cf. *Rhet. Her.* 2.12.18.

²³ Frier (1985) 95–6 for a brief introduction and how the 'brusque and business-like' *in iure* stage might have worked in the *Pro Caecina*. As Metzger (2010) argues, *in iure* referred not only to physically being 'in court' but also to the whole first stage or process.

²⁴ For the praetor's role, see Brennan (2000).

²⁵ *OLD*² s.v. 'exceptio' (3); cf. *Cic. Inv. rhet.* 2.19.57: *praetoris exceptionibus multae excluduntur actiones* ('many cases are excluded by the praetor's *exceptiones*').

that will be argued in the next stage, and appoints the judge or *recuperatores* for the court case *in iudicio*.²⁶

This (still brief) explanation of the system of civil law in Rome emphasises how compressed the Auctor's account is and the assumptions he makes regarding his readership. He expects them to be familiar with legal terminology and to understand the nuanced ramifications of the system in practice. It may be the case that *in iure* and *in iudicio* were not particularly specialised terminology but actually well known. In elite Roman Republican society, civil law cases would have been a common occurrence for protecting and recovering property and, unlike the enclosed modern legal systems, the location and openness of the courts might have made familiarity with such terminology commonplace. On the other hand, in the parallel passage found in the *De Inventione*,²⁷ Cicero is more specific in his phrasing as he sets out the three functions of the *in iure* stage in some detail.²⁸ Cicero's decision to give his reader more information suggests that the system was not well known by everyone. The reader would need more than a superficial understanding of the processes behind the terminology in order to make the required connections between *exceptiones*, the *in iure* stage of the trial, and Transference in the *Rhetorica ad Herennium*.

The Auctor's wording in his explanation suggests that, in general, he has been discussing oratory *in iudicio*; if the type had only occurred *in iure* he would not have discussed it further. This is understandable: the orator would make his speech either for the prosecution or defence *in iudicio*. This may explain why the Auctor does not push his description of the *in iure* stage of the civil trial further, and neither does he return to explain the role of the praetor.

What does seem reasonably clear from the Auctor's discussion of Transference is that he gives his reader the minimum amount of contextualising information required to understand and appreciate his chosen *exemplum*. The reader must have gained (or have

²⁶ For legal procedure, see Metzger (1997); Lintott (2004) (in Cicero's time); Metzger (2010).

²⁷ Cic. *Inv. rhet.* 2.19.57-9.

²⁸ Cic. *Inv. rhet.* 2.19.58: *Ibi enim et exceptiones postulantur et agendi potestas datur et omnis conceptio privatorum iudiciorum constituitur* ('for there [*in iure*] exceptions are demanded, the power of bringing a case is granted and the whole formula of private trials is agreed').

been able to gain) a reasonably competent level of proficiency with regard to civil law processes in order to take the Auctor's rhetorical advice at face value.²⁹

Six Parts of *ius*

Transference was one part of the *Rhetorica ad Herennium* where the Auctor could be seen to engage with civil law, and he does so again in a sub-section of the Juridical Issue (*iuridicialis constitutio*). Here the Auctor illustrates his own knowledge of past laws and implies that the reader must also know about the wider legal context.

The Absolute (*absoluta*) part of the Juridical Issue seems entirely devoted to civil law, although the Auctor does not say so explicitly. Fortunately, Cicero does exactly that in his introduction to the parallel section of *De Inventione*, saying that this Issue is 'one which contains in itself a debate related to civil law'.³⁰ In this section of Book 2 the Auctor defines the six divisions (*partes*) of law (*ius*), which are Nature, Statute, Custom, Previous Judgements,³¹ Equity and Agreement.³² I will discuss the examples the Auctor gives for these divisions and where they come from.

The Auctor gives a specific *exemplum* for each of these divisions apart from Nature, where he says generically that 'it is by this law that parents are nurtured by their children and children by their parents'.³³ In the *De Inventione*, by contrast, Nature is the one that Cicero gives a well-explained example for, in contrast to a brief description for the other divisions.³⁴

²⁹ For more about the Roman education system, see Chapter 7.

³⁰ Cic. *Inv. rhet.* 2.21.62: *negotialis est quae in ipso negotio iuris civilis habet implicatam controversiam*. There is a difference in the terminology here, which arises from the different arrangement of *constitutiones* used by the two authors (see Chapter 2). The topics that Cicero discusses under his Legal Issue, which is a subtype of the Qualitative (*generalis*) Issue, are the same as those listed by the Auctor under the Absolute Juridical Issue. See Masiello (2006) for a detailed analysis of the six parts of *ius* in both texts.

³¹ I use Caplan's term here for consistency, but a better translation might be Legal Precedents.

³² *Rhet. Her.* 2.13.19: *natura, lex, consuetudo, iudicatum, aequus et bonus, pactum*. Cf. *Rhet. Her.* 1.14.24, where the Auctor uses the *exemplum* of Accius suing for *iniuria* (repeated in Book 2).

³³ *Rhet. Her.* 2.13.19: *natura ius est quod cognationis aut pietatis causa observatur, quo iure parentes a liberis et a parentibus liberi coluntur*.

³⁴ *Natura*: Cic. *Inv. rhet.* 2.21.62-7; *consuetudo, pactum, par, iudicatum, iura legitima*: Cic. *Inv. rhet.* 2.21.67-8.

The Auctor uses the Twelve Tables to exemplify two of these parts of *ius*: Statute law (*lege ius*) and the law of Agreement (*ex pacto ius*). The Twelve Tables are a system of laws devised in the mid-fifth century BCE, and they were particularly important for the jurists' interpretations of the law; I will discuss them further below in that context. As an example of Statute law, the Auctor recalls the very first statute from the Twelve Tables (1.1) by saying *ut in ius eas cum voceris* ('so that you may go to court when you are summoned'). He describes this as a 'kind' (*genus*) of Statute law. As part of his definition of law from Agreement, the Auctor uses another set of statutes (*leges*),³⁵ which again come from the first Table (1.6-9). In this case the Auctor specifies that there are certain agreements, *pacta*, that should be observed according to the laws, meaning the Twelve Tables. He goes on to say that the statutes decree that, when parties have a contract on a case, they should plead the case, but if they do not have a contract they should come to the Comitium or the forum before midday to outline their case.

The Auctor uses the Twelve Tables in these two situations in a way that does not appear to be merely superficial but actually attests to their use and importance in the civil law system that the Auctor is describing. There are limits to their influence: the Auctor also mentions agreements (*pacta*) that are observed *sine legibus*, independently of statutes, and Cicero in the *De Inventione* does not quote the Twelve Tables at this point.³⁶ Despite this, the Auctor relies on them to illustrate the very basic structures of *ius* in a way that suggests they are fundamental both for his own understanding of law and what a reader might already be familiar with. To put this in context, Cicero comments nostalgically in his later work, *De Legibus*, that when he was young (that is, around the time of the *Rhetorica ad Herennium* or slightly earlier) students would learn the Twelve Tables by heart.³⁷ Cicero's comment seems to support the idea that the Auctor's *exempla* closely parallel what his audience could or should know.

³⁵ *Rhet. Her.* 2.13.20.

³⁶ *Cic. Inv. rhet.* 2.22.65-8.

³⁷ *Cic. Leg.* 2.23.59. It would be interesting to know whether Cicero learned this when he was an apprentice in the Roman forum with the jurist Quintus Mucius Scaevola (the Augur) or before.

The example for another division of law, Legal Custom (*consuetudine ius*), describes the right for someone to request money that has been deposited with a banker from the banker's partner. As Caplan notes, there were few such examples in Roman civil law so the Auctor has done well to find an instance of Legal Custom that is not too obscure or difficult to grasp.³⁸ In his parallel definition, however, Cicero does not use this example but makes the only allusion in either work to the Praetor's Edict. The Praetor's Edict was also known as the *ius honorarium* and was (re)issued annually by the urban praetor.³⁹ It listed and defined the cases that could be brought before the Praetor *in iure* to be taken forward *in iudicio* and thus must have had a significant impact on the everyday lives of advocates in the forum.

Cicero introduces this *exemplum* by saying that some customary laws have become fixed (*certa*) because of their age. Within this type of law, according to him, the majority are those that the praetors have decreed.⁴⁰ This illustrates the effect that the Praetor's Edict had had by the time Cicero was writing, establishing Legal Custom as an important part of Roman civil law that codified and gave voice to what is 'approved by the will of all people' (*voluntate omnium...comprobarit*).⁴¹ Through this, Cicero also confirms the way that the Praetor's Edict worked, giving a picture of a fairly standard collection of edicts being carried over from year to year.⁴²

Cicero's brief treatment of the praetor and his edict in the *De Inventione* suggests that its absence from the *Rhetorica ad Herennium* is not so strange, as indeed the Auctor does not mention it in the text.⁴³ It may be that the *De Inventione* and *Rhetorica ad Herennium* represent the moment at which the Praetor's Edict began to gain greater written (as well as practical) recognition. Watson suggests that the edict had become increasingly important by the end of the second century BCE but notes that it does not appear in the texts of the jurists until Publius Rutilius Rufus and Quintus Mucius Scaevola (the Pontifex), writing in

³⁸ Caplan (1954) *ad loc.*

³⁹ See Watson (1970), (1974); Brennan (2000); Kondacreiff (2010).

⁴⁰ Cic. *Inv. rhet.* 2.22.67: *In ea autem quaedam sunt iura ipsa iam certa propter vetustatem. Quo in genere et alia sunt multa et eorum multo maxima pars, quae praetores edicere consuerunt.* ('In this division there are some laws that have themselves become fixed due to their age. In this type are many other laws and, of those, the greatest part by far are those which the praetors are accustomed to decree.')

⁴¹ Cic. *Inv. rhet.* 2.22.67.

⁴² However, there was some flexibility: Cicero discusses the innovative aspects of Verres' Edict in 74 BCE (*Verr.* 2.1.103-158). See Frier (1985) 44-57 and Harries (2007) 88 on the eventual codification of the edict.

⁴³ Although Watson (1974) 38 identifies *Rhet. Her.* 4.25.35 as an *edictum de convicio*.

the 80s BCE and onwards.⁴⁴ The edict clearly was significant enough for Cicero to discuss the version that Verres issued as urban praetor in 74 BCE during his prosecution of Verres in 70 BCE. A turning point came in 67 BCE, when the *lex Cornelia de iurisdictione* decreed for the first time that a praetor had to adhere to his own edict.⁴⁵ This may have resulted in a more stable and consistent edict that people found easier to use. Before this point, the application of the Praetor's Edict may have been rather unpredictable, possibly even more so during the Social War and the years following. Then by the time Cicero was writing *De Legibus* (52-46 BCE), Atticus could comment that the Praetor's Edict was now more important for legal learning than the Twelve Tables. Whatever the reason behind the Auctor's failure to mention it in the *Rhetorica ad Herennium*, though, it is surely not an indication that he was unacquainted with the Praetor's Edict or unaffected by it.

Indeed, in the Auctor's discussion of the next division of law, Previous Judgements (*iudicata*), he comes close to referring to the Praetor's Edict when he gives examples of the decisions of different praetors.⁴⁶ Here the Auctor focuses on the problem that Previous Judgements are often contradictory. Each judge, praetor, consul or tribune of the plebs who might be judging a case could decide whichever way he wanted. Often, the Auctor says, different decrees or judgements were made about the same thing one after the other.⁴⁷ He gives two examples of this. The first involves two conflicting judgements about whether or not to grant a breach of contract against an heir, an action that was granted by Marcus Livius Drusus as urban praetor in c.115 BCE but not by Sextus Julius Caesar, urban praetor in 123 BCE. In the second case, the judge Gaius Caelius (Caldus?) acquitted the man who attacked the satirist Lucilius on stage (before 103 BCE), but Publius Mucius Scaevola condemned the one who had named Lucius Accius, perhaps in 136 BCE.⁴⁸

⁴⁴ See Watson (1974) 35-6 (and cf. 120), although he notes (40) that this might be an impression created by the survival of the evidence. He also argues that the jurists played a significant role in the creation of the edict, and that the jurists became more important as the edicts were reformed in the early first century: (1974) 101-2. Brennan (2000) 442-3 discusses the tribunal of Quintus Pompeius Rufus, as found in Cic. *De or.* 1.37.168 and the implications for the development of the formulary procedure.

⁴⁵ Asc. *Corn.* 59C.

⁴⁶ It is worth noting that Previous Judgements are not simply identical to historical *exempla*, although they are similar in form, as Previous Judgements lack 'moral implications': van der Blom (2010) 15.

⁴⁷ *Rhet. Her.* 2.13.19: *Iudicatum est id de quo sententia lata est aut decretum interpositum. Ea saepe diversa sunt, ut aliud alio iudici aut praetori aut consuli aut tribuno plebis placitum sit; et fit ut de eadem re saepe alius aliud decreverit aut iudicarit* ('Previous Judgement is when a sentence was given or a decree interposed about that subject. These judgements are often contradictory, as it seemed right to one judge, praetor, consul or tribune of the plebs [to judge] in one way, and another in another; and so it often happens that about the same subject there are opposing decrees or judgements').

⁴⁸ *Rhet. Her.* 2.13.19, with Caplan's dates. At *Rhet. Her.* 1.14.24 there is another brief summary of the example involving the poet Lucius Accius.

The implication is that Previous Judgements, as a division of law, were not always powerful; a former legal decision did not create a definite obligation for the next judge(s) to decide in the same way.⁴⁹ The Auctor goes on to give two specific arguments that could support, or conversely undermine, the use of Previous Judgements: the judge and the circumstance. Although a judge's reputation and character might well be discussed,⁵⁰ their legal knowledge could not be assumed, as I have already mentioned. This meant that the judgements of these non-legal experts were not always in accordance with the law. Even if they were, a lack of legal authority meant they could be contradicted and rejected by future judges and orators. In order to counteract this, the Auctor implies that a whole body of evidence about the circumstances of past judgements and the significance of similar or conflicting past judgements should be weighed up before they were implemented. The potential for precedents to be conflicting demands greater skill from the advocate as well as knowledge of the broader context. For this reason, advocates had to be aware of, or able to access information about, recent legal history and its protagonists.

The final division of law that the Auctor discusses is based on Equity (*ex aequo et bono ius*). The example given here is of a man more than sixty years old who wishes a *cognitor* to represent him on account of personal illness. Again, this example, which is the earliest mention of such a procedure in the Roman system, seems to refer to an actual event.

The discussion of the six parts of law shows the Auctor's own awareness of chronological developments and his ability to source relevant judgements to begin forming specific arguments. This is particularly evident in his *exempla* of past judgements, but is also relevant elsewhere. The implication is that the future advocate should recognise his own place in legal development and situate himself in that movement, aware of the wider importance of cases.

Inheritance

⁴⁹ See Harries (2006) 134-48.

⁵⁰ See for example Cicero's extended praise of judges such as the praetor Marcus Glabrio (*Verr* 1.17.51-2), Gallus (*Quinct.*) and Calpurnius Piso (*Q Rosc.*).

In the last chapter I introduced Cicero's rhetorical work *De Oratore*, where he discusses the criminal trial of Norbanus in the mid-90s BCE. Despite the emphasis on this example, much of the debate in the text is actually about civil law.⁵¹ In the first book of *De Oratore*, the characters of Lucius Licinius Crassus and Marcus Antonius discuss whether it is important for the orator to know about (civil) law or whether eloquence is sufficient. Set in 91 BCE, nearly forty years before Cicero was writing, this dialogue does not record a specific argument between Crassus and Antonius, but may still point to a topic of conversation that was current at that time. Only a year previously in 92 BCE, a civil case now known as the *causa Curiana* had seen Quintus Mucius Scaevola speak against Crassus, two men who were called by Cicero 'the most eloquent of the jurists' and 'the best lawyer among the orators' respectively.⁵² The Auctor does not mention the *causa Curiana*, but there are many other *exempla* that relate to inheritance in the *Rhetorica ad Herennium*. It is not hard to imagine that this complex trial about the intricacies of inheritance sparked a real debate about oratory and the law amongst interested parties. In this section I explore the case and the consequences it may have had on broader debate, by comparing its presentation in the *De Inventione* with examples of inheritance in the *Rhetorica ad Herennium*.

In Cicero's reference to the *causa Curiana* he does not name the case or any of the participants but the details of the case make the identification clear.⁵³

A head of a household, when he had no children, but he had a wife, wrote this in his will: if I have one or more sons, let him be my heir. Then the usual phrases. Afterwards: if the son dies before he comes of age, then let the following man be my heir. A son was not born. The next of kin dispute with the man who was heir if the son died before he came of age.

Coponius was the man who made the will, while Manius Curius was named as the reversionary heir, whom Crassus spoke for. The next of kin was Marcus Coponius and Scaevola was his advocate.⁵⁴ In Cicero's text this is an example of Letter vs Spirit. A very

⁵¹ Fantham (2004) 107, cf. Cic. *De or.* 1.10.39-44.

⁵² Cic. *Brut.* 145. For the *causa Curiana* see Bauman (1983) 341-51; Vaughn (1985); Frier (1985) 135-7; Tellegen and Tellegen-Couperus (2000); Harries (2006) 97-102.

⁵³ Cic. *Inv. rhet.* 2.42.122: *Paterfamilias cum liberorum haberet nihil, uxorem autem haberet, in testamento ita scripsit: si mihi filius genitur unus pluresve, is mihi heres esto. Deinde quae assolent. Postea: si filius ante moritur, quam in tutelam suam venerit, tum mihi secundus heres esto. Filius natus non est. Ambigunt adgnati cum eo qui est heres si filius ante quam in tutelam veniat mortuus sit.*

⁵⁴ See Vaughn (1985).

similar but much lengthier example occurs earlier in the work under the Qualitative Legal Issue as an example of natural law.⁵⁵ In this case a child is born but dies young. The dispute is again between a reversionary heir and the next of kin. The near-repetition of the *exempla* suggests that this subject provides good material for Cicero's rhetorical handbook and a challenge for the advocate. Cicero does not give a 'right' answer for the *exemplum*, but Crassus was the successful advocate in the real case after arguing in favour of the spirit of the law.

Although the *causa Curiana* does not feature directly in the *Rhetorica ad Herennium*, many other examples of inheritance are present in the Auctor's text. One of these instances is a series of four laws (*leges*) used to illustrate a *controversia* from Analogy (*ex ratiocinatione controversia*).⁵⁶ This example describes Malleolus's conviction for matricide and his punishment, which involved having his head wrapped in wolf's hide and 'wooden shoes' (*soleae lignae*) placed on his feet before being led to prison and put to death. The *Periochae* of Livy confirm that Malleolus was in fact the first to suffer this unusual punishment when the case occurred in 101 BCE.⁵⁷ Subsequently there was a dispute about whether his younger brother or his testamentary heirs should inherit, as it was unclear as to whether Malleolus was able to make a will. The four laws are compared in order for the case to reach a conclusion. Apart from the third law in the series, which describes the punishment for someone convicted of murdering a parent, each law can be assigned to Table 5 of the Twelve Tables (5.7a, 5.3, and 5.4-5 respectively).⁵⁸

Cicero uses the same laws and *exemplum* to illustrate Analogy; although he does not name Malleolus in his *exemplum*,⁵⁹ it is likely that his choice was influenced by the recent occurrence of the case. The Malleolus case and punishment were extraordinary and it was surely memorable in its own right. The Auctor in particular (giving more detail than Cicero) shows his awareness of the resultant debate about whether Malleolus had the right to make a will or not.

⁵⁵ Cic. *Inv. rhet.* 2.21.62-7.

⁵⁶ *Rhet. Her.* 1.13.23.

⁵⁷ Livy *Per.* 68.

⁵⁸ On that basis, Marx (1894) 107 argues that it is possible the third law also belongs there, although it is not found in Cicero's parallel use of the three other laws and *exemplum* in *Inv. rhet.* 2.50.149. The two accounts are also slightly different in the details of the case, as the Auctor names Malleolus as being convicted of matricide, whereas Cicero does not give a name to his perpetrator of patricide.

⁵⁹ This is part of a broader tendency in the *De Inventione* that is discussed further in Chapter 3.

In connection with this, there are also frequent references to less remarkable cases in the remainder of the *Rhetorica ad Herennium*. For example, the *exemplum* discussed above for Previous Judgements described the decisions of the praetors Livius Drusus and Calvus in response to a breach of contract against an heir.⁶⁰ There is also another case that appears in both the *De Inventione* and the *Rhetorica ad Herennium* about the wording of a will bequeathing silver vessels to a man's wife.⁶¹ Inheritance is also recognised as a motive for murder in this period and *exempla* describe heirs being accused of crimes by advocates.⁶²

Therefore, since it is evident that a man was killed, he must have been killed by thieves, by his enemies, or by you, whom he made a part-heir in his will.

Other *exempla* also use inheritance as part of the prosecution or to weaken an opponent's case. In one *exemplum*, the defendant's lack of inheritance is used as part of an argument to show that they must have acquired their wealth illegally.⁶³ Similarly, the impossibility of inheriting a piece of land (because the owner was still alive) is used as evidence in an accusation *de vi possessio*.⁶⁴ The Auctor also gives an example where an inheritance had been squandered; the heir's wastefulness was a mark against their character.⁶⁵ Conversely, the Auctor illustrates that the topic could play a part in a defence, as a large inheritance would make it unnecessary for a defendant to commit a crime.⁶⁶

As these *exempla* suggest, inheritance was probably a common issue in the civil law courts of Rome, and one that would have affected a broad spectrum of society. Nevertheless, its repeated occurrence in the *Rhetorica ad Herennium* may reflect a heightened awareness amongst advocates of the difficulties surrounding inheritance cases after the *causa Curiana*.

⁶⁰ *Rhet. Her.* 2.13.19.

⁶¹ *Rhet. Her.* 1.12.20; *Cic. Inv. rhet.* 2.40.116.

⁶² *Rhet. Her.* 2.21.33: *quoniam igitur hominem occisum constat esse, necesse est aut a praedonibus aut ab inimicis occisum esse aut abs te, quem ille heredem testamento ex parte faciebat*. See also *Rhet. Her.* 3.20.33 and *Cic. Inv. rhet.* 1.48.89.

⁶³ *Rhet. Her.* 4.23.33.

⁶⁴ *Rhet. Her.* 4.29.40.

⁶⁵ *Rhet. Her.* 4.53.67.

⁶⁶ *Rhet. Her.* 4.38.50.

In this section I have studied three important ways in which civil law occurs in the *Rhetorica ad Herennium*: legal processes are implied in the discussion of Transference, recent history is used to illustrate the different parts of the law, and the practical application of the law is manifested in references to inheritance. Yet in each of these cases there are gaps in the Auctor's presentation and a wider context that he does not refer to. To complete the picture developed here it is the jurists and their legal knowledge that are necessary. In the next section I will explore one way in which jurists, rhetoricians and orators are directly connected and how information and ideas could pass between them.

Rhetoricians, orators and jurists: the feedback loop

The Auctor's use of the Twelve Tables to define different parts of law suggests their importance in the system. The references also connect the Auctor's approach to civil law to that of the jurists, who had been writing and commenting on the ancient statutes for (at least) the century prior to the *Rhetorica ad Herennium*. While the Auctor's references to the Twelve Tables are underpinned by juristic knowledge, the interest of the jurists is also justified by the on-going inclusion of the statutes in civil law oratory. The jurists would have no need to continue discussing and responding to issues in the Twelve Tables if their advice on this subject was not being sought. This creates a feedback loop between rhetoricians, orators and jurists, which I will explore in this section.⁶⁷

The first-known jurist to write about the Twelve Tables was Sextus Aelius (*cos.* 198, *cens.* 194 BCE), who wrote a work known as the *Tripertita*. This text is thought to have taken its name from its examination of each law of the Twelve Tables in three parts: the clause, the interpretation, and the related action.⁶⁸ Aelius is mentioned first by the character Antonius in Cicero's *De Oratore* in his list of the most learned jurists. The two jurists who follow in the sequence are Manlius Manilius (*cos.* 149) and Publius Mucius Scaevola (*cos.* 133), who is found in the *Rhetorica ad Herennium* condemning the man who named the playwright Lucius Accius on stage.⁶⁹

⁶⁷ See Harries (2006) 92-115 for the relationship between jurists, advocates and legal knowledge.

⁶⁸ Pomp. *D.* 1.2.2.38. Cf. Watson (1974) 135.

⁶⁹ *Rhet. Her.* 2.13.19; Cic. *De or.* 1.48.212.

The later writer Pomponius, in a detailed passage at the beginning of the sixth century CE *Digest*, also includes others in the long tradition of jurists.⁷⁰ Pomponius traces the development of the Roman state, including law and magistracies, from Romulus to the imperial period.⁷¹ He begins with Publius Papirius, who is said to have written down the *leges regiae*, and traces legal knowledge through to the first person to practise civil law, Tiberius Coruncanius (*cos.* 280). Following Sextus Aelius' generation, he includes Marcus Iunius Brutus (*pr.* 142) alongside Manilius and Publius Mucius Scaevola as the three founders of civil law (*fundaverunt ius civile*). Pomponius knows of at least 20 treatises preserved between them, although he does not discuss their content. Amongst their pupils of the next generation, he includes figures such as Publius Rutilius Rufus and Crassus.

Pomponius then comes to Quintus Mucius Scaevola, the son of Publius, who was the most important jurist when the *Rhetorica ad Herennium* was being written. Besides his political career and his role in the *causa Curiana*, he wrote a work entitled *De Iure Civili*, which is described by Pomponius as the first legal text to be written *generatim* ('under headings').⁷² It was presumably intended as a resource for the use of jurists when giving responses (*responsa*) to queries about the law from plaintiffs, advocates, judges and magistrates.⁷³ In addition, the work may have aimed to define civil law as separate from pontifical law.⁷⁴ Although his approach may have been innovative, the subject matter seems to have been based on the Twelve Tables, like earlier juristic writings.⁷⁵

It is not certain exactly when Scaevola wrote the *De Iure Civili*, but Harries puts forth a convincing argument that it was written in the 80s BCE, some while after his consulship in 95 BCE and not long before his death.⁷⁶ The temporal context is, of course, important, and Harries demonstrates how differently the work would be perceived if it were written earlier, in the 90s BCE, when Scaevola was at the peak of his career. If it was written in the 80s BCE, however, the work should be viewed with the *Rhetorica ad Herennium* in the

⁷⁰ See Frier's discussion of this passage, with further references: (1985) 155-8.

⁷¹ Pomp. *D.* 1.2.2.1-52. See *D.* 1.2.2.36-41 for the period from Papirius to Scaevola (the Pontifex).

⁷² Pomp. *D.* 1.2.2.41. See Watson (1974) 143 for a possible reconstruction of the order and issues discussed.

⁷³ Cic. *De or.* 1.48.212, *Top.* 17.65-6.

⁷⁴ Harries (2006) 38.

⁷⁵ Frier (1985) 159. Cf. Harries (2006) 43: it 'may have been both traditionalist and revolutionary'; Harries (2007).

⁷⁶ Harries (2006) 19-21.

context of the period after the Social War and the subsequent enfranchisement of Italians, which hugely increased access to civil law and the courts of Rome. Certainly the implication of Scaevola's project (which in any case must have taken several years) is that there was an ongoing conversation, in some circles, about whether the civil law was fit for purpose. It is also worth considering that the audience of this work on civil law might not necessarily be different to that of the Auctor's rhetorical handbook, as Watson points out: *De Iure Civili* could have been 'a handbook for persons appearing in the ordinary courts on private law matters'.⁷⁷

Evidently the Twelve Tables were an essential part of Scaevola's conception of civil law at this time, and this provides a link to the *Rhetorica ad Herennium* and the *De Inventione*, both of which employ clauses from the Twelve Tables as *exempla* at key points. This usage serves to confirm the relevance of Scaevola's thinking about the Twelve Tables within the wider conversation of the period, which is also suggested by Cicero's reference in *De Legibus* to his own education (as quoted above).⁷⁸

However, as Cicero implies, interest in the Twelve Tables did not continue in the same way; less than 40 years later it appears that they were no longer essential learning. Cicero may be exaggerating in *De Legibus*, but the decline is reflected elsewhere. Watson surveyed references to the Twelve Tables in the later Ciceronian evidence (political speeches, forensic speeches and theoretical writings).⁷⁹ Watson concluded that in Cicero's forensic speeches, he used the Twelve Tables for their moral authority only and relied on the audience recognising the statutes.⁸⁰ In other texts, Cicero used statutes from the Twelve Tables with more enthusiasm and frequently named them.⁸¹ Watson concludes that the non-juristic audience still respected the statutes for their antiquity, but that as a source of law among legal experts they became less favoured.

⁷⁷ Watson (1974) 156, although he admits this is problematic and would not explain, for example, the presence of *postliminium*.

⁷⁸ Cic. *Leg.* 2.23.59.

⁷⁹ Watson (1974) 116-21.

⁸⁰ As they are not always referenced, as in the *Rhetorica ad Herennium*.

⁸¹ Watson (1974) 121. Cf. Cic. *Leg.* 1.21.55, 1.22.57, 2.23.58-25.64, 2.24.61 (provisions in accordance with nature), 3.8.19, 3.19.44 (excellent provisions), *De or.* 1.57.245, *Off.* 1.12.37, 3.15.61, *Tusc.* 2.23.55, 3.5.11, 4.2.4 (where they are usually mentioned by name). They are not named in *Top.* 2.10, 4.23, 4.24, 10.43, 16.64, *De or.* 1.56.237.

Cicero's later writings, such as the *De Oratore*, also suggest that Scaevola's work did not always feel quite so relevant, perhaps because of this gradual shift away from the Twelve Tables. In *De Oratore*, Cicero suggests that he (through the character of Crassus) intends to write a complete theory of civil law, which presumably would have aimed to improve upon Scaevola's treatment.⁸² Additionally, Cicero does not seem to have used the *De Iure Civili* extensively to write the *Topica*, which contained many *exempla* from legal sources.⁸³ Later too, Servius Sulpicius Rufus also wrote several works on civil law,⁸⁴ one of which was directed specifically against Scaevola (*Reprehensa Scaevolae Capita*);⁸⁵ in fact, Cicero considered Sulpicius Rufus a better jurist than Scaevola.⁸⁶ It also seems to be implied by one of Cicero's letters that Gaius Trebatius Testa, one of the foremost jurists of his generation,⁸⁷ did not own a copy of *De Iure Civili*.⁸⁸

However, as Fantham notes, the much later volumes addressed *ad Q. Mucium* by the jurist Pomponius and his contemporary Laelius Felix suggest that the work did prove to be a significant turning point for the study of civil law and jurisprudence.⁸⁹ The continuing response to the text from these and later authors, whatever their opinion, shows how influential it was up to and including its presence in the *Digest* 600 years later.

By placing the *Rhetorica ad Herennium* in context alongside the *De Iure Civili*, then, something can be learned about both works and the wider situation. In general, the interest of the Auctor in the Twelve Tables seems to correlate with that of Scaevola (and by implication other jurists), and this correlation between jurists and oratory continues in the Ciceronian evidence. There seems to be a relationship between the handbooks and the

⁸² Cic. *De or.* 1.42.190, cf. Gell. *NA* 1.22.7.

⁸³ Reinhardt (2003) 69.

⁸⁴ Gell. *NA* 4.1.7, 4.3.2; Pomp. *D.* 1.2.2.41.

⁸⁵ Gell. *NA* 4.1.20.

⁸⁶ Cic. *Brut.* 151.

⁸⁷ Cic. *ad Fam.* 7.5 = SB 26.

⁸⁸ Cic. *ad Fam.* 7.22 = SB 331. After disagreeing with Trebatius Testa over whether or not a *controversia* existed if an heir who had not yet inherited charged someone with theft, Cicero went home and consulted a work he found there. He marked the chapter containing the *controversia*, and sent it to Trebatius Testa (*id caput...tibi misi*). From this, it can be deduced that Trebatius Testa did not own the work that Cicero consulted, which was, it is argued, the *De Iure Civili* of Scaevola. See Fraenkel (1957) 67 (following Huvelin [1915] 320); Shackleton-Bailey (1977) *ad loc.* Cicero implies which work he is referring to but does not cite it explicitly, so it does seem that Trebatius Testa knew of the work but did not regard it highly enough to own it or, it seems, to have read it as thoroughly as Cicero had.

⁸⁹ Fantham (2004) 114.

juristic work to the extent that, it could be argued, they take the same approach to sources and topics of civil law by necessity.

The Twelve Tables are present in the *Rhetorica ad Herennium* because they are a topic of interest in the on-going dialogue between jurists, rhetoricians and orators (who are not necessarily different people). This may also apply to other features of civil law that occur in the *Rhetorica ad Herennium* and *De Inventione*. For example, as I have suggested, the frequent references to issues of inheritance may be a result of that topic receiving more attention from both sides after the high-profile *causa Curiana* of 92 BCE. If this were the case, the role of jurists in relation to rhetoricians and orators in the early first century BCE would not simply be a supplementary one, filling in gaps of legal knowledge, but also an active one, determining in some cases the subjects being taught and the points of interest pursued.

Distinctive style: criminal and civil law compared

I have now studied the Auctor's approach to criminal and civil law in the *Rhetorica ad Herennium* through a series of different perspectives. In this final section I will turn to what the practical results of his advice might have been, and ask whether the text can reveal anything about how a civil law trial may have sounded in comparison to a criminal *quaestio*.

As I discussed at the beginning of the previous chapter, the Auctor does not make a distinction between the rhetorical skills required by civil law and criminal law. It must be supposed that in the first two books of the *Rhetorica ad Herennium*, which refer almost exclusively to the Judicial case, both the criminal and the civil types of approach are being treated equally. Similarly, no explicit distinction is made in Book 4, where the Auctor describes the rhetorical techniques and stylistic adornments to be used in speaking. However, there are suggestions in other texts that the style of speaking in a criminal case

and a civil case were rather different, and I will discuss these before returning to the *Rhetorica ad Herennium*.⁹⁰

In an article published in 1938, F. Solmsen analysed the rhetoric of Cicero's early speeches, focusing largely on the defence of Sextus Roscius of Ameria in a criminal trial before a *quaestio* (80 BCE). However, he also compared this speech to Cicero's other extant speeches from the same period, which were from civil trials.⁹¹ Solmsen concluded that in these speeches 'the desire to prove the point at issue overshadows everything else', including manipulating the emotions of the audience.⁹² As he says, the *Pro Caecina*, composed nearly two decades after the *Rhetorica ad Herennium*, makes great use of 'technical devices' relating to legal interpretation, a feature that Frier enlarged upon in *The Rise of the Roman Jurists*.⁹³

In his *De Optimo Genere Oratorum*, written in 46 BCE, Cicero advocates the Attic style of oratory over the Asiatic. In particular, he recommends Lysias as a good model because of the simplicity of his style. Yet Lysias is not as good to imitate as Demosthenes, Cicero says, because Lysias has had to adapt his style to the many private cases that his speeches were written for.⁹⁴ These private cases are a different type of case. Cicero then gives an example from his own, Roman, experience:⁹⁵

But if they think that it was appropriate, with an army stationed in the forum and in all the temples around the forum, to speak in defence of Milo as if we were speaking in a private case to a single judge, then they are judging the power of eloquence on the basis of their own ability, rather than the nature of the case.

Here, Cicero explains that the style of oratory should be adapted to the nature of the case (*rei natura*). This is a common tenet in rhetorical handbooks,⁹⁶ but Cicero is explicit here

⁹⁰ Crook (1995) 139, with reference to Quint. *Inst.* 4.2.177, 9.4.21, 11.1.44-5, 12.9.7, 12.10.70 (more relaxed style); Tac. *Dial.* 20, 37 (criticism of *Pro Tullio* and *Pro Caecina*); Cic. *Opt. Gen.* 9-10 ('slender' and 'rich' styles of oratory).

⁹¹ That is: *Pro Quinctio* (81 BCE), *Pro Q. Roscio comoedo* (?76-68 BCE), *Pro M. Tullio* (72-1 BCE), *Pro M. Fonteio* (?69 BCE), *Pro A. Caecina* (?69 BCE), *Pro A. Cluentio* (66 BCE). Dates from Powell and Paterson (2004).

⁹² Solmsen (1938b) 553.

⁹³ Frier (1985).

⁹⁴ Cic. *Opt. Gen.* 3.9.

⁹⁵ Cic. *Opt. Gen.* 4.10: *Sed si eodem modo putant exercitu in foro et in omnibus templis, quae circum forum sunt, conlocato dici pro Milone decuisse, ut si de re privata ad unum iudicem diceremus, vim eloquentiae sua facultate, non rei natura metiuntur.*

⁹⁶ See for example *Rhet. Her.* 2.26.43; cf. 4.37.49-50; Cic. *Inv. rhet.* 1.49.92-3, *De or.* 3.25.97, 55.210-2.

that the nature of the case includes and is dictated by its context, whether it is public or private, criminal or civil. In this case, Cicero's 'power of eloquence' (*vis eloquentiae*) could not be as it might before a single judge because of the uncomfortable and intimidating presence of the army.

Other comments on the practical delivery of a speech come from Cicero's *Brutus*, written in the same year. The work is particularly informative about the different styles of orators from the early second century BCE onwards. One particularly relevant example is the discussion of Scaevola's performance when defending his fellow jurist (and quaestor in Cilicia) Rutilius Rufus against a charge of extortion in a *quaestio* of 92 BCE.⁹⁷ Although Cicero says that Scaevola spoke elegantly (*polite*), it was 'not at all with the power and force that was demanded by that kind of court and the importance of the case'.⁹⁸ This suggests that a criminal trial usually required a different type of oratory, which Scaevola did not manage to produce (according to Cicero), perhaps because he was more accustomed to participating in civil law trials.

In later rhetorical works there are also comments that suggest civil law speeches were different to those for criminal law. Tacitus in the *Dialogus* claims that few could then bear to hear about the *exceptio* and *formula* of civil law, as he says are found in Cicero's *Pro Tullio* and *Pro Caecina*.⁹⁹ He goes on to say that there is a big difference (*multum interest*) between speaking about theft, a praetorian formula or an interdict in civil trials, and about extortion in the *quaestio*.¹⁰⁰ Quintilian also notes the difference in style and approach between defending a client on a capital charge and in a case of inheritance.¹⁰¹ Using the same methods might result in general ridicule, but it would also be inappropriate because each judge has a different character that should be taken into account through different styles of eloquence.¹⁰² Quintilian says that the orator should use a different, simpler kind of rhythm and that he may be more restricted in subject matter in a civil case.¹⁰³

⁹⁷ *TLRR* 94.

⁹⁸ *Cic. Brut.* 115: *nequaquam autem ea vi atque copia quam genus illud iudici et magnitudo causae postulabat.*

⁹⁹ *Tac. Dial.* 20.

¹⁰⁰ *Tac. Dial.* 37.

¹⁰¹ *Quint. Inst.* 12.10.70.

¹⁰² *Quint. Inst.* 11.1.44-5.

¹⁰³ *Quint. Inst.* 4.4.21, 12.9.7.

These comments provide a far from systematic overview of what rhetoricians and orators considered to be the main differences between civil and criminal oratory, but the focus in each author seems to be on Style and Delivery rather than Invention and Arrangement. This implicitly supports the Auctor's grouping together of criminal and civil cases under the Judicial type of case in order that the same arguments and topics might be used for both.

Nevertheless, the Auctor's failure to distinguish explicitly between the two when he is discussing Style and Delivery could signal a different approach. Without the final two books of *De Inventione* there is no contemporary point of comparison here. It may be that the distinction between styles of speech in civil and criminal trials was in reality not as well defined as it later became, if Cicero, Tacitus and Quintilian are correct. The distinction may have developed as the number of *quaestiones* increased and particularly after Sulla's expansion of the *quaestio* system around 82 BCE. The Auctor's choice may also reflect his audience, their abilities and ambitions; he may have thought that speaking in a criminal trial was not a priority for them and would be an unnecessary complication at this stage in their rhetorical training.

However, it could be argued that the Auctor does teach his reader about the differences implicitly. For example, the grouping of the Legal and Juridical Issues is useful because it brings the discussion of the law into a single place in the text, and I have discussed above the importance of the examples that come from civil law. Yet from another perspective, it could be argued that by treating the topics together in this way, the Auctor restricts thinking about civil law to a narrow part of the text. This might reflect Quintilian's later suggestion that the subject matter of an orator was more limited in a civil law speech.¹⁰⁴

On the other hand, as I discussed in the previous chapter, most of the *exempla* that refer to the *iudices* of criminal law appear in the fourth book on Style. In fact, two of the *exempla* that refer to the *iudices* illustrate the Auctor's precepts of the Grand and Middle styles at the beginning of his discussion of Style. The Grand Style, using 'very ornate words'

¹⁰⁴ Quint. *Inst.* 12.9.7.

(*ornatissima verba*) and ‘weighty maxims’ (*graves sententiae*)¹⁰⁵ would thus seem more suited to the criminal court, against the simpler style and rhythms that Cicero and Quintilian recognise as being characteristic of a speech at civil law.

But if the Grand and Middle Styles are located in the criminal courts, perhaps the final Style – Simple – is intended to illustrate speech from a civil case. The Auctor defines his Simple Style (*ex-* or *adtenuta oratio*) as being akin to the ordinary, everyday style of speaking.¹⁰⁶ The *exemplum* he uses to illustrate the Simple Style is part of a Statement of Facts, which defends a young man’s embarrassment at being addressed by a stranger (*ignotus*) who claimed the youth’s slave boys had beaten him.¹⁰⁷

Now our friend went into the baths and, after washing, started to rub himself dry. Then, when he fancied going into the pool, suddenly there was this guy: ‘Listen boy’, he said, ‘your slaves just beat me up; you should make it right.’ And our friend, who was at the age where being accosted by a stranger wasn’t normal yet, went red.

The advocate here is trying to persuade the listener that the young man’s blush was understandable in an unfamiliar situation, presumably in order to counter or pre-empt the opposing advocate’s use of the blush as a sign of a guilty conscience.¹⁰⁸ If this attack by the slave boys was the main charge that the defence advocate was repudiating, then the charge itself might well have been *iniuria*, tried before a single judge under the Praetor’s Edict, and therefore a civil law case. Equally, another possibility also from the civil law sphere is suggested by the use of *fama* in the last line of the *exemplum*, which might be a verbal echo of a charge of *infamia*.

It is not conclusive, but certainly the *exemplum* for the Simple Style seems to point to a civil law origin. This is in contrast to the Grand and Middle Styles, which derive from *quaestiones*. Although the Auctor does not vocalise this lesson explicitly, it may have been more obvious to an ancient reader than it is today, or indeed the Auctor may have been

¹⁰⁵ *Rhet. Her.* 4.8.11.

¹⁰⁶ *Rhet. Her.* 4.8.11: *usitatissima puri consuetudo sermonis*, 4.10.14: *infimus et cottidianus sermo*.

¹⁰⁷ *Rhet. Her.* 4.10.14: *Nam ut forte hic in balneas venit, coepit, postquam perfusus est, defricari; deinde, ubi visum est ut in alveum descenderet, ecce tibi iste de traverso: ‘Heus’, inquit, ‘adolescens, pueri tui modo me pulsarunt; satis facias oportet.’ Hic, qui id aetatis ab ignoto praeter consuetudinem appellatus esset, erubuit.*

¹⁰⁸ See the discussion of Subsequent Behaviour (*consecutio*), part of the *narratio* in a Conjectural cause (*Rhet. Her.* 2.5.8), including the use of blushing (*erubuisse*) as evidence.

able to add this information in person.¹⁰⁹ The distinction he provides, and the point at which he gives it, agrees with the analyses of later authors that the difference between the oratory of the two types of cases is largely one of Style.

The use of the Statement of Facts to exemplify this Style might also confirm that the focus in a civil case was on the point at issue rather than emotional appeals, as Solmsen argues for Cicero's early speeches. This different approach to civil trials may again be influenced by the interaction between jurists and advocates making civil law speeches. The Simple Style of speech may even reflect the practice of less eloquent jurists acting as advocates. Here too it is important to be mindful of where and how jurists complement the system of advocacy and how that might have an impact on rhetoric and oratory.

In his exemplification of Styles, then, the Auctor does go some way to demonstrating the difference between the criminal and civil trials. Importantly, he does this in a way that is consistent with the other references inside and outside of the *Rhetorica ad Herennium*.

Conclusion

In this chapter my aim was to demonstrate the Auctor's approach to civil law and how it might be influenced by the presence of the jurists. As jurists only interpret civil rather than criminal law, this contrasts with the discussion of the previous chapter. The way the Auctor uses real laws and legal scenarios confirms his own knowledge and experience as well as the expectation he has for his students. This is a contrast to the discussions of the previous chapter, where references to criminal law were couched in terms of guidance (how to deal with *maiestas*) or avoidance (the use of *pathos* instead).

The Auctor's discussion of civil law topics and his assumptions about his reader's knowledge strongly imply that the jurists were important for a rhetorical education. The legal knowledge they possessed and preserved was crucial for an orator and advocate

¹⁰⁹ As I discuss in Chapter 7.

working in civil law. This does not necessarily mean that all orators were highly trained in the law by jurists, yet whether they were or not they would by necessity have a lifelong relationship with them.

This seems to be exemplified by the Auctor's repeated references to inheritance, which suggest that juristic questions influenced the concerns of rhetoricians. More than this, the intellectual and practical interests of rhetoricians, jurists and orators were closely aligned, as shown by the seemingly correlating use of the Twelve Tables over several decades. The approach of the *Rhetorica ad Herennium* and *De Inventione* could perhaps be described as unquestioning in their implicit attitude towards the jurists, while the debate of Cicero's later *De Oratore*, which encourages orators to know the law themselves, might render them obsolete or reflect their growing irrelevance.

Finally, the Auctor's choice of a Simple Style illustrates how the theoretical discussion of civil law amounts practically to a Style of oratory that is notably different to that used in criminal law. The Auctor is aware of the need to tailor a speech to the temperament of a specific judge, whose individual likes and dislikes may be known to the advocate.

In a similar way, the Auctor has tailored the *Rhetorica ad Herennium* to the requirements of his audience in the way that he has produced the work. By adapting rhetorical theory, returning to particular challenges, and referring to events of interest he has created a handbook that reflects their likes and dislikes too. Having studied the historical, theoretical, political and legal aspects of the work, in the next chapter I will discuss the conclusions that can be drawn about the audience and their learning environment.

Chapter 7: Educating the reader

The audience of the *Rhetorica ad Herennium* was not limited to Herennius alone. Instead, the Auctor took care while writing the text to make it suitable and useful for others. Who these others might have been can be inferred from the way the Auctor constructs his handbook. The context of the *Rhetorica ad Herennium* is, to some extent, their context and the context of the education system in Rome at the time.¹ As R. Webb remarks, rhetorical handbooks can be seen as ‘the archaeological remains of part of a broader educational process’.² In previous chapters I have made initial suggestions about the conclusions that can be drawn about this audience, and this chapter will bring together those different arguments to look at the audience more directly.

Although the Auctor does not give many clues about his addressee Herennius, it is still useful to start with him as the immediate audience of the text. Herennius’ request for a handbook already seems to imply an abnormal situation and begins to suggest something about the wider audience for the work. As Herennius needed to ask specifically for help with his rhetorical education (and was not sure that he would receive it),³ the likelihood is that he is not a ‘full-time’ student in Rome who is undergoing training in a normal way.⁴ Instead, it rather suggests that he is above the usual age of learning rhetoric and beyond his late teens.

It is unlikely that Herennius is simply a fictitious character or everyman figure, yet it makes sense that the Auctor imagines his real life companion to be representative of the rest of his audience too. His situation, prompted to learn about public speaking rather late, might be one that many others also found themselves in.⁵

¹ There are many major works on Roman education, such as Gwynn (1926); Marrou (1958); Bonner (1977); Morgan (1998); Bloomer (2011), edited volumes such as Too (2001); Evans Grubbs and Parkin (2013); Bloomer (2015), and Joyall, McDougall and Yardley (2009) for the sources. There are also relevant essays about rhetorical education in May (2002); Dominik and Hall (2007); Gunderson (2009); Steel (2013).

² Webb (2001) 290.

³ *Rhet. Her.* 1.1.1.

⁴ I discuss rhetorical education further below, with reference to Cicero’s experience.

⁵ See Gildenhard (2007a) 207-75 for his reading of Cicero’s *Tusculan Disputations* as a ‘drama in education’ with Cicero’s interlocutor representing the *Romanus adulescens*. Gildenhard considers Cicero’s didactic approach effective in his use of concepts and terminology familiar to the student and in the gradually increasing difficulty of the text.

With this in mind, the timing and character of the *Rhetorica ad Herennium* point to a large group of possible candidates: the newly enfranchised Italian citizens. As I have mentioned above, and other scholars have suggested previously,⁶ the Italians who received citizenship after the Social War would place a significant burden on Rome's legal system by bringing cases. The *Rhetorica ad Herennium* is the training they needed to be able to step into the Roman forum with confidence.

The way the *Rhetorica ad Herennium* is written fits this audience in several ways. As discussed in previous chapters, the Auctor assumes a level of knowledge and political engagement that is compatible with an older, more experienced student. The handbook format enables the student to work around other commitments and the Auctor does not expect them to learn from visiting the forum, but from doing rhetorical exercises. Finally, unlike in the *De Inventione*, there is no implication that the Auctor expects the reader to apply this knowledge specifically in a civil court as a regular advocate, or anywhere else, but equips them with the necessary skills to speak in public as and when necessary.

Necessary knowledge

At least one thing is certain: the Auctor is writing for a knowledgeable audience. Students would come to the subject of rhetoric at a late stage in their education, if they got there at all. Those who continued to study at this advanced level were usually sons of the wealthy elite who could afford to do so.⁷ Rome did not have a formalised system for educating children and young people and much of it may have been done at home with siblings or in small groups. The lack of a state education system in Rome is something that Polybius found fault with and it meant that only those wealthy families who could afford to pay for private tutors were able to educate their children to a higher level.⁸

⁶ Frier (1985) 273-87.

⁷ See Corbeill (2007) for the effects of this.

⁸ According to Cicero's character Scipio in *Rep.* 4.3. Corbeill argues that a 'lack of a formal system of education at the level of the state does not mean the state does not control education': (2001) 262. See Clarke (1968); Corbeill (2002a) for Cicero's early education. Treggiari (2015) traces the education of Cicero, his brother and his children.

Roman education began at a young age, where boys and girls were taught their letters and basic reading skills. They would have been taught this at home, perhaps by a parent or by a *grammaticos*. They then moved on to a second stage of their education, where they studied poets and basic rhetorical exercises, also with the *grammaticos*.⁹

More detail about these basic exercises comes from Quintilian, who gives his own account of what a student should be trained in before they come to the rhetorician.¹⁰ Whilst implying that this account is an unusual addition to the rhetorical handbook,¹¹ Quintilian perhaps inserts it here as a useful reminder for students. Its inclusion may also be a response to the practice of the *grammatici*, who had begun to teach a greater number of the more advanced rhetorical exercises themselves, a practice of which Quintilian disapproved.¹² The account is valuable evidence for rhetorical exercises as viewed from a late first century CE perspective. By this time, the rhetorical exercises described by Quintilian had been formalised into a set programme known by the Greek term *progymnasmata*.¹³

It is not known when the *progymnasmata* took the form in which they appear in Quintilian's handbook.¹⁴ Suetonius, writing slightly later than Quintilian, gives a list of exercises that he thought were taught by the *grammatici* in the Republican period: 'set themes, paraphrases, addresses, statements of cause'.¹⁵ Suetonius' account seems to suggest that certain exercises had been fixed in the curriculum for some time, but it is hard to be sure whether his evidence applies to the early first century BCE or not. Despite this, it is logical to assume that exercises of this kind were familiar to students in some form before they reached a rhetorician in the Auctor's time.

⁹ Bonner (1977) 250-74; Webb (2001). It is likely that fewer girls were involved in the later stages of education.

¹⁰ Quint. *Inst.* 1.9.

¹¹ Quint. *Inst.* 2.11.1.

¹² Quint. *Inst.* 2.1.1-4, with Reinhardt and Winterbottom (2006).

¹³ Bonner (1977) 250-74; Webb (2001).

¹⁴ See Frazel (2009), who demonstrates that Cicero has a close relationship with Greek 'exercises' (*exercitationes*; Suet. *Rhet.* 26.1) and written forms of practice throughout his career, without going so far as to say that the *progymnasmata* were fixed in the early first century BCE. See also Reinhardt and Winterbottom (2006) 74-7, who include a list of the twelve exercises and discuss Quintilian's relationship to Theon, a writer of *progymnasmata* who may have been a contemporary. For the *progymnasmata*, see Kennedy (2003).

¹⁵ Suet. *Gram.* 4.5-6: *problemata, paraphrasis, allocutiones, aetiologias et alia hoc genus*.

When the student did begin to study with a rhetorician he would expect to develop these rhetorical exercises into their more advanced forms, which trained the student in formulating and developing narratives, proofs, impersonations and interpretations of law.¹⁶ For further, practical experience the student could then spend time under the tutelage or mentorship of a family member or connection in the forum, known as the *tirocinium fori*. The *Rhetorica ad Herennium* seems to reflect these advanced stages of learning,¹⁷ challenging the student to practise constructing entire speeches using a variety of complex rhetorical techniques. Similarly, the Auctor actively encourages his reader to practise different styles of argumentation and narration.¹⁸

But a student would not only be knowledgeable in rhetorical exercises when he began learning with a rhetorician. His study of the poets would have given him some grounding in literature and history, and his everyday life in Rome may have introduced him to contemporary events, politics and the legal trials of the Roman forum. Formal education in law, history and philosophy, though, seem to have come after rhetorical training or during it at the earliest.¹⁹ This is certainly Cicero's experience according to his own account in the *Brutus*, when he became a pupil of the law after studying oratory in the courts. For a year (aged around 17) Cicero learned about the life and expertise of a jurist by listening to the advice of the famous advocate Quintus Mucius Scaevola to those who came to ask for it. Then in 88 BCE, Cicero turned to philosophy when the philosopher Philon and other Athenians fled to Rome. At this time he also attended lectures given by Molon of Rhodes who was a philosopher and 'an excellent pleader'.²⁰ Quintilian also places the study of historical texts and narratives alongside rhetorical training in the first century CE.²¹

In this sense, then, the level of knowledge and engagement that the *Rhetorica ad Herennium* assumes may be beyond what is typical for a young man in Rome. In the

¹⁶ See the examples given by Suetonius: *Rhet.* 25.4.

¹⁷ Corbeill (2002a) 43. Corbeill refers to the *tirocinium* as informal education which 'supplements the rhetorical tradition' with moral considerations (46). Cf. Bonner (1977) 84-5; David (1992) 330-41.

¹⁸ I will discuss the specific instances where the Auctor's instructions could function as rhetorical exercises below.

¹⁹ Bonner (1977) 85.

²⁰ Cic. *Brut.* 306-7.

²¹ Quint. *Inst.* 2.4.2.

previous chapters I have discussed the assumptions the Auctor makes about the legal knowledge of his reader, including intricate details about the functioning of a civil trial. By contrast, in Cicero's *De Inventione* a greater level of detail is provided to explain such processes, personnel and payment.

The historical knowledge that is taken for granted in the *Rhetorica ad Herennium* is also perhaps significant in this regard. In legal discussions and elsewhere the Auctor makes frequent references to events of ten to fifteen years ago, such as the case of Malleolus (who was thrown into the Tiber), the defeat of the elder Caepio at Arausio and the tribunate of Saturninus. In several places he relies upon the authority of Lucius Licinius Crassus as a powerful orator, a man who had died several years previously. Again, there is a contrast with the *De Inventione* where Cicero mostly uses *exempla* that are decades old or derive from Greek contexts, and a historical understanding would not be important or necessary.

The most significant event in the text, though, as I have discussed several times, is the Social War. The Social War must have been unavoidable for most people in Rome; the loss of important generals in the first year of the war and the successes of the later stages were surely the subject of general conversation. Yet the Auctor's focus does not fall on the reported actions of the Roman armies or generals. Instead he presents arguments in favour of the *lex Varia*, he raises the question of whether citizenship should be granted to the allies, and he praises the loyal Italian towns of Alba Fucens and Pinna. In this context and elsewhere he also references a previous, failed Italian uprising in Fregellae. This combination of high-level debate, a broader Italy-wide perspective and the historical long view places demands on the reader's knowledge and awareness.

Politically, too, the Auctor seems to expect his audience to bring a certain level of engagement or thought to their reading of the text. As discussed in the previous chapter, the Auctor has a strong sympathy for the series of murdered '*popularis*' tribunes who included, most recently, Marcus Livius Drusus (d. 91 BCE) and Publius Sulpicius Rufus (d. 88 BCE). These powerful *exempla*, including the final *exemplum* of the text describing Tiberius Gracchus' death, were chosen for a reason and the Auctor expected them to provoke a reaction amongst his audience.

From the studies of previous chapters, then, the Auctor's audience seem to be an engaged and historically aware group of people, who may have had political opinions and sympathies arising from events of recent decades. This does not fit the image of a young schoolboy fresh from studying poets and simple rhetorical exercises.

There are indications elsewhere that the study of rhetoric was not only for the young. In around 93 BCE, Lucius Plotius Gallus set up his school of *rhetores Latini* and Cicero, who began his rhetorical training shortly afterwards, was advised not to attend.²² Although Cicero began studying rhetoric at this young age, then, he continued to be a student beyond his teenage years.²³ In fact after leaving Rome to study philosophy and rhetoric further in Greece under Molon of Rhodes, Cicero was almost 30 by the time that he returned to Rome to resume his legal career full time.²⁴ Suetonius also reports that Cicero attended the lectures of Marcus Antonius Gripho when he was a praetor in 66 BCE at the age of 40.²⁵

Cicero was not unusual in this, either. In his letters to Atticus, Cicero discusses taking on the consuls-designate Gaius Vibius Hirtius and Aulus Pansa as students.²⁶ They were politically powerful men who must have already given many speeches in their careers in order to carry out magisterial duties as well as gain support. Still, further training was available and they saw it as beneficial. Cicero's *De Oratore* contains a similar implication, as the two men who represent the next generation in the dialogue are Sulpicius Rufus, thirty-three, and Gaius Aurelius Cotta of the same age. By this point Sulpicius Rufus had already famously opposed Marcus Antonius in court in the Norbanus case, which is a focus of the *De Oratore*'s discussion.²⁷ Yet the curiosity of these two men and the questions they pose to the older experts, Crassus and Antonius, drive Cicero's dialogue forward. In its

²² Suet. *Rhet.* 26.1.

²³ See Frazel (2009) 42-9 for a full discussion of Cicero's continuing education; cf. Dugan (2005) 221, 225, 229 with reference to the contrast between Cicero and Hortensius in *Brutus* (e.g. *Brut.* 320-1), followed by Prost (2014).

²⁴ The lengthy period of Cicero's education may partly be a result of the political climate in the 80s BCE, during which he describes the situation in Rome as seeming 'that the system of the courts had really been destroyed forever' (*Brut.* 306: *tamen sublata iam esse in perpetuum ratio iudiciorum videbatur*).

²⁵ Suet. *Gram.* 7.2.

²⁶ Cic. *Att.* 14.12.1. Cf. Cic. *Fam.* 9.18.1; Suet. *Gram.* 25.3. For Cicero as an *exemplum* and teacher, see van der Blom (2010) 311-5.

²⁷ See e.g. Cic. *De or.* 2.47.197-49.201 and elsewhere.

immediate context, then, the rhetorical instruction that Cicero's expert teachers give is directed towards two men whose public careers were already underway.²⁸

There was no consensus about an end-point for rhetorical education in Rome; it was not over when a man gave his first successful speech in court, for example. The study of rhetoric and oratorical performance could be returned to again and again. More than this, the study of rhetoric and oratorical performance could surely be turned to for the first time in later life too. The potential for older men to take part in rhetorical education shows that this was a skill worth investing in at any age. It is not necessary to assume that Herennius and the Auctor's other readers were boys who would not understand many of the historical, political and legal references in the text. Instead, it is possible to envisage a more experienced audience of Italian citizens for whom this context resonated strongly.

The learning environment

The way the Auctor expects his audience to learn is another means of thinking about who they are and what their needs are. Schools were perhaps not very common in the early first century BCE; Suetonius talks of 'twenty well-attended schools' of grammar in the period after Metellus Numidicus' exile in 100 BCE.²⁹ However, as Kaster argues, Suetonius is as vague here as elsewhere in these introductory passages and this 'after' (*posthac*) can only be taken as specifically as the first half of the first century BCE.³⁰ According to Suetonius again, the first famous grammar teacher was Servius Nicanor and he was active around 100 BCE.³¹ For the later stages of education, Schmidt argues that there were no rhetorical schools in Rome before that of Plotius Gallus,³² but a lack of evidence means this cannot be confirmed.

²⁸ Quintilian also hopes that his work will be useful for 'young men of ability' (*bonae mentis iuvenes*; see also Quint. *Inst.* 2.5.2: *robusti iuvenes*). The use of the word *iuvenis*, which can refer to adult males up to the age of 45 (according to the *OLD*²), and usually means someone older than an *adulescentus* (according to Lewis and Short), also suggests an ideal audience who were potentially somewhat older.

²⁹ Suet. *Gram.* 3.4. See Bloomer (2013) for an overview of schools and schooling in the ancient world.

³⁰ Kaster (1995) *ad loc.*

³¹ Suet. *Gram.* 5.1. See Kaster (1995) *ad loc.* for further discussion.

³² Schmidt (1975) 192-4. But see Rawson (1985) 50: 'a rhetorical training was open to the Greekless, but hardly the penniless', as cited by Kaster (1995) *ad* 26.1.

The Auctor expects Herennius to learn alone and does not mention other students, but assumes that face-to-face teaching in a school-like environment will play an important role in the process. At the beginning of Book 3, the Auctor tells Herennius what is left for him to cover and what Herennius should do whilst he is waiting for Book 4.³³

In the meantime, you will learn what I have previously set out with me, whenever you want to, and also sometimes without me, by reading.

The Auctor makes himself available to Herennius here as a teacher whenever he is needed. There is a focus on the togetherness of teacher and student suggesting that the Auctor envisages himself playing an active and supportive role, which gives the text another dimension. At the end of the work the Auctor concludes by telling Herennius that he will be successful in learning rhetoric because, unlike others, he has someone to practise with. Moreover, the Auctor says, ‘we are pleased to practise together’.³⁴ This affirms the Auctor’s intention of assisting Herennius in real life and makes clear that this element of student/teacher interaction was, in the Auctor’s view, key to success.³⁵

The experiences of three other Romans make a good comparison at this point. As M. Bloomer notes, the Romans were not ‘good educational historians’,³⁶ but Cicero gives accounts of the education of Tiberius Gracchus, Crassus and himself in *Brutus* and *De Oratore*. These descriptions provide some insight into how other members of the elite might expect to learn,³⁷ and how things may have changed in the decades leading up to the time of the *Rhetorica ad Herennium*.

³³ *Rhet. Her.* 3.1.1: *interea prima quaeque et nobiscum cum voles, et interdum sine nobis legendo consequere*. This is also similar to what the Auctor says at the end of Book 2 (*Rhet. Her.* 2.31.50). Although the Auctor notes that he is trying to write each successive book quickly to continue Herennius’ education, there is no indication of how long the envisaged period of study would have been overall. The Auctor says that he will move on to the other rules straight away at the end of Book 2 (*deinceps, Rhet. Her.* 2.31.50) and at the beginning of Book 3 looks forward to finishing Book 4 quickly (*celeriter, Rhet. Her.* 3.1.1), yet he still assumes that Herennius will have time to go back over the material thoroughly and learn it in the meantime. For the importance of reading and literate education, Morgan (1998) esp. 236–7.

³⁴ *Rhet. Her.* 4.56.69: *simul libenter exercemur*.

³⁵ The Auctor also implies the availability of voice coaches who can assist with volume and stability (*Rhet. Her.* 3.11.20). Compare this with Quintilian’s teaching style as described by Reinhardt and Winterbottom (2006) xxv–vi where spoken exercises were central, although listening, writing and reading were also important; see e.g. Quint. *Inst.* 2.2.8, 2.2.14, 2.4.15, 2.5.1, 2.5.3.

³⁶ Bloomer (2011) 52.

³⁷ But see Bloomer (2011) 23–5 on the problems of relying on biographies as evidence for education.

Tiberius Gracchus (b. 168 BCE) would have been receiving his rhetorical education in the 150s BCE, around the time that the senate and Cato the Elder were displaying public anxiety about the influence of rhetoricians. As a high-ranking member of the elite, his education was probably fairly typical of that section of society. Cicero gives a short account of his education in the *Brutus*:³⁸

Gracchus was taught through the care of his mother from childhood and educated in Greek literature. For he always had excellent teachers from Greece, and in particular among these, when he was a young man, Diophanes of Mytilene, the most eloquent man of Greece at that time.

Although his early education was carried out by his mother and Greek masters, the implication is that Tiberius' oratorical skill derived from 'the most eloquent man of Greece at that time', Diophanes of Mytilene. The context for Tiberius' education is a private one; he does not go to school but is attended by masters. The content of Tiberius' education is largely Greek: as well as learning stories from Greek literature at an early age, he continued to be taught by Greeks and probably in Greek.³⁹

In the following generation, Crassus (b. 140 BCE) seems to have played an active role in designing his own rhetorical training programme at a more advanced stage, which shifted between Greek and Latin. As Crassus' character describes in *De Oratore*, he began by reading some poetry or a speech and then reproducing the arguments using different words, as his enemy Gaius Papirius Carbo did.⁴⁰ This suggests that these kinds of exercises were starting to become popular with young men and spread among students of their generation. Crassus used Latin examples – Ennius and Gracchus – to illustrate these exercises.⁴¹ Later he decided to translate Greek speeches into Latin instead, making original translations using the best Latin words rather than trying to find substitutes.⁴² The focus on the end-language, Latin, is clearer in Crassus' education than it was in Gracchus'. Although Cicero focuses on the theoretical side of Crassus' education, both Crassus in *De Oratore* and the real-life Crassus seem to prefer the practical side of oratory. The character

³⁸ Cic. *Brut.* 104: *fuit Gracchus diligentia Corneliae matris a puero doctus et Graecis litteris eruditus. Nam semper habuit exquisitos e Graecia magistros, in eis iam adulescens Diophanem Mytilenaeum Graeciae temporibus illis disertissimum.*

³⁹ For the Greek influence on Roman education see recently Connolly (2007b); Stroup (2007); Sciarrino (2015).

⁴⁰ Cic. *De or.* 1.34.154. See Fantham (2004) 78-101.

⁴¹ Cic. *De or.* 1.34.154. This pairing is echoed in the Auctor's preface to Book 4: *Rhet. Her.* 4.1.2.

⁴² Bloomer considers this description to reflect Cicero's own education, rather than Crassus': (2011) 44.

Crassus recommends that rhetorical education be taken to ‘the front line’ (*acies*) of the forum, and as he had done in reality when he prosecuted Carbo in 119 BCE, aged 21.⁴³

Cicero’s own rhetorical education began around 91 BCE when he attended the courts regularly and listened to speakers there.⁴⁴ Besides this, he says ‘I continued daily to write, read and practise speaking’;⁴⁵ this was a way of consolidating his thoughts about the oratory he had heard. But by his own admission Cicero did not enjoy continuing with ‘only’ rhetorical exercises; I have already discussed his subsequent progression to legal and philosophical training.

Further details of Cicero’s education may be implicit in Crassus’ description of the declamatory training undertaken by Sulpicius Rufus and Cotta in 91 BCE:⁴⁶

Certainly I approve of those things you yourselves usually do, when you argue a case reckoned very similar to those cases that are brought to the forum, and adapt it as far as possible to real life.

Crassus emphasises that this practice is beneficial because it is very close to reality – both in the type of case and the way it is approached by good students.⁴⁷ This could reflect Cicero’s own memories of the training he was undergoing at the same time, which he says in the *Brutus* ‘would now be called declamation’.⁴⁸

⁴³ Cic. *De or.* 2.40.170.

⁴⁴ For the wider context of this autobiographical section of the *Brutus*, see Prost (2014); Dugan (2005) 189–233.

⁴⁵ Cic. *Brut.* 305: *et scribens et legens et commentans oratoriis*. Cf. Cic. *De or.* 1.34.157.

⁴⁶ Cic. *De or.* 1.33.149: ‘*equidem probo ista*,’ Crassus inquit ‘*quae vos facere soletis, ut, causa aliqua posita consimili causarum earum, quae in forum deferuntur, dicatis quam maxime ad veritatem accommodate*’.

⁴⁷ The subject of declamation is an interesting one because the term does not appear in any surviving works before the *Rhetorica ad Herennium*, where it only refers to exercises for strengthening the voice (*Rhet. Her.* 3.11.20), rather than general rhetorical exercises. The way that Crassus describes students who declaim badly as people who ‘only exercise their voice (but not in a skilful way) and physical strength, increase the quickness of their tongue and take pleasure in a multitude of words’ (Cic. *De or.* 1.33.149: *sed plerique in hoc vocem modo, neque eam scienter, et viris exercent suas et linguae celeritatem incitant verborumque frequentia delectantur*) might suggest some conflict or confusion between what was called *declamatio* in the 90s BCE and what *declamatio* became. Although declamation as a rhetorical exercise becomes very common in the later first century, the extent to which it was practised in Cicero’s youth, and how, is very little known. See Bonner (1949); Calboli (1972); Clarke (1996)³; Kaster (2001); Gunderson (2003); Calboli (2007); Corbeill (2007); van der Poel (2009).

⁴⁸ Cic. *Brut.* 310: *declamitans – sic enim nunc loquuntur*.

A major change from Gracchus to Cicero was that Latin replaced Greek as the language of rhetoric, although Cicero did learn rhetoric and declaim in Greek too.⁴⁹ Advanced rhetorical exercises seemed to become more popular in Crassus' time before becoming rather more fixed and compulsory (and less enjoyable) in Cicero's generation. Indeed, the advent of rhetorical handbooks such as the *Rhetorica ad Herennium* and the *De Inventione* may partly be a response to this trend.

The word Cicero uses to describe his rhetorical exercises is *exercitationes*, and this is an important term in the *Rhetorica ad Herennium* too. Calboli has noted that the word appears 15 times in the *Rhetorica ad Herennium* compared with four in the *De Inventione*;⁵⁰ it is also the last word of the whole text. The term appears both in the singular ('practice') and in the plural ('exercises').⁵¹ In the first paragraph, the Auctor says that he will give Herennius one piece of advice:⁵²

Theory without constant attention to speaking does not help much. You ought to understand that this method of teaching should be applied in practice.

This implies that the theory must be learned but also supplemented by a practical element, albeit one that still takes place in a (seemingly) private context. As the Auctor says again in Book 2, Invention ought to start from theory but practice can easily supply the rest.⁵³ There is not a contrast between these two elements: they follow on logically from one another, obviously, as the Auctor's 'you ought to understand' implies. Instead, the idea of putting theory into practice (*exercitatio*) is separated from going over things in your head (*in animo*), which the Auctor also advises Herennius to do. Just as mental exercises were not included in Cicero's list of *exercitationes*, the Auctor's idea of practice (*exercitatio*) is also practical, and goes further than just knowing or understanding something from the book.

The importance of *exercitatio* is particularly emphasised at the beginning and end of each book. As quoted above, the Auctor begins Book 3 by saying that he expects Herennius to study (by reading, *legendo*) when he is not present, but also to practise what he has learned

⁴⁹ Suet. *Gram.* 3; Plut. *Cic.* 4.6.

⁵⁰ Calboli (1972) 121.

⁵¹ Calboli (1972) 121.

⁵² *Rhet. Her.* 1.1.1: *si te illud unum monuerimus, artem sine assiduitate dicendi non multum iuvare, ut intellegas hanc rationem praeceptionis ad exercitationem accommodari oportere.*

⁵³ *Rhet. Her.* 2.4.7.

from the text. At the end of the same book, the Auctor repeats that it is ‘greatly necessary’ (*maxime necesse est*) to practise what has been learned so far.⁵⁴ *Exercitatio* is part of the learning process implicit in the handbook’s content but the handbook also forms part of the *exercitatio*, when it functions as a sort of revision guide.

To help with this, the *Rhetorica ad Herennium* also includes *exercitationes* such as Cicero describes himself and Crassus doing. This demonstrates the utility of a handbook too: it could provide the reader with the necessary material and act as a direct route from theory to practice. The Auctor is not always explicit about how or where a student could use the material to do their own exercises but in one instance he does give specific instructions. The same guidelines also appear in the *De Inventione*,⁵⁵ suggesting that the *exercitatio* was an older, tried and tested suggestion that came from their common source.

The context of this *exercitatio* is the Statement of Facts (*narratio*). According to the Auctor there are three types of Statements of Facts, one that is factual, one that is designed to move the audiences, and a third that is not actually used in a civil court case. This last one, the Auctor says, is a good one to practise (*exerceri*) so that the first two types can be better dealt with in court.⁵⁶ The Auctor goes on to give some detail about this third type of Statement of Facts, which can either be based on facts (recounting legendary, historical or imaginary events) or people (discussing character traits and possible changes of fortune). He gives examples of these different topics as well as some clues about Style: imaginary events are comparable to the ‘plots of comedies’ (*argumenta comoediarum*) and a Statement of Facts about people should have ‘humour’ (*festivitas*).

It is worth considering that for modern readers, and perhaps other novices in Roman rhetorical education, there is still a big step between reading the Auctor’s advice and putting it into practice. As discussed above, it must be assumed that the Auctor’s reader would be familiar with this style of rhetorical exercise from the earlier stages of their education, or that the Auctor was willing to develop this skill with them, and hence they

⁵⁴ *Rhet. Her.* 3.24.40.

⁵⁵ *Cic. Inv. rhet.* 1.19.27.

⁵⁶ *Rhet. Her.* 1.8.12: *tertium genus est id quod a causa civili remotum est, in quo tamen exerceri convenit, quo commodius illas superiores narrationes in causis tractare possimus*. See Calboli Montefusco (2006).

would be able to discourse upon these subjects as prompted. If this is the case, the Auctor's advice provides a helpful and illustrative way to begin working towards what he calls *veritas*, 'truth', or an actual trial.

In Book 4, too, as Fantham points out, the rhetorical figures and stylistic models would make 'natural exercises'.⁵⁷ The *exempla* provide realistic themes or cases that could easily be expanded on by the student to practise in the way that Crassus described Sulpicius and Cotta doing in *De Oratore*. Calboli goes so far as to say that most (if not all) of the *exempla* in the *Rhetorica ad Herennium* are derived from declamations or declamatory themes.⁵⁸ However it would be very difficult to distinguish between *exempla* from real life and declamatory exercises if declamation did treat subjects very close to those of a law court, as Cicero suggests through Crassus.⁵⁹ The Auctor's own advice is that imaginary events are permitted as long as they resemble reality to some extent.⁶⁰ In any case, the varied styles, subjects and lengths of the *exempla* used by the Auctor give students plenty of material to work with.

Cicero's account of his own education suggests that these exercises would be done alone, probably at home, in the form of independent study. The importance of this kind of practice to the Auctor suggests that this form of learning would be a major feature in the experience of his audience. After all, the Auctor does not mention the possibility of his readers visiting the Roman forum and listening to speeches being made there, as Crassus and Cicero do. Perhaps this is because it was too obvious, or perhaps it is another indication that his audience were otherwise engaged and a visit to the Roman forum would not be possible. It may be that his audience did not have time, or they may not have lived permanently in Rome, hence a written handbook with exercises included may have been a way for students to study around other commitments. At the end of the work, the Auctor suggests that oratory was not Herennius' main concern; this may also be true for his other readers.

⁵⁷ Fantham (2004) 92. See also Marx (1894) 102-11; Calboli (1972) 123-6.

⁵⁸ Calboli (1972) 122.

⁵⁹ There has been some discussion about to what extent abstract themes appear in early *declamatio*. Bonner suggests that if they did exist then the Auctor does not tend to use them and Calboli agrees that the Auctor largely relies on examples taken from declamations about Roman history and a Greek (or Rhodian) source: Bonner (1949) 25; Bonner (1977) 318; Calboli (1972) 123-6.

⁶⁰ *Rhet. Her.* 1.8.13, 1.9.16.

Using the skills

The Auctor concludes the *Rhetorica ad Herennium* by reassuring Herennius: it does not matter if he does not get as far with public speaking as he would like because ‘there are other, better things that we strive for more intently in life’.⁶¹ This is another important indication that Herennius is not aiming to be a career politician or an advocate dependent on his oratorical ability. Instead, Herennius already has other interests and (presumably) other means of support.

The same may also be true for other users of the text. The Auctor does not specify what he thinks his learners will do with what they have learned from his work. Judicial oratory is the focus, but as I have discussed in previous chapters, no distinction is made between civil and criminal oratory. This might not be surprising; the same is true of Quintilian’s later rhetorical handbook, yet Quintilian is clearly training elite young men who will encounter both scenarios during their political careers. On the other hand, the greater legal detail provided by Cicero in the *De Inventione* about advocates and procedures in civil trials is a strong implication, which is lacking in the Auctor’s work. The lack of specificity in the *Rhetorica ad Herennium* could reflect another possibility: that the Auctor’s readers would attend civil and criminal courts on an ad hoc basis depending on their own personal involvement in trials.

The Auctor also prepares his audience for speaking elsewhere. He includes a discussion on the Plea for Mercy (*deprecatio*) because it can be brought before the senate or a *consilium*, although the technique is not usually permissible in Roman courts.⁶² The Auctor says, ‘it did not seem right to pass over it’ (*non visa est supersedenda*), indicating that he made a conscious decision to include the material. A similar justificatory comment appears in *De Inventione* for this technique,⁶³ but the different vocabulary used by the two authors in this

⁶¹ *Rhet. Her.* 4.56.69: *alia sunt meliora quae multo intentius petimus in vita.*

⁶² *Rhet. Her.* 2.17.26.

⁶³ *Cic. Inv. rhet.* 2.34.105: *quare hoc genus, quamquam in iudiciis non versatur nisi quadam ex parte, tamen, quia et pars haec ipsa inducenda nonnumquam est et in senatu aut in consilio saepe omni in genere tractanda, in id quoque praecepta ponemus* (‘since, although it does not come up in *iudiciis* except in part,

instance suggests that they have either reached or reasserted this conclusion independently. It must have been plausible that their readers would participate in discussions (or, at least, pleas) in these contexts.

The Auctor is not necessarily writing for an audience who will simply enter the Roman forum and work their way up from there. Although someone with those interests could certainly use the work, he is primarily writing for someone like Herennius, who is interested in learning how to speak in public but not as their main occupation.

Conclusion

As is clear from the many comparisons with *De Inventione* in this and previous chapters, the Auctor has adapted traditional rhetorical theory in such a way as to reflect his audience. It seems likely that a major part of this audience was made up of the newly enfranchised Italian citizens. From legal knowledge to a level of political and historical awareness, the reliance on independent study away from the Roman forum, and the suggestion that they may need to speak in different locations, the Auctor makes his handbook suitable for them in various ways.

The *Rhetorica ad Herennium* could fast track these users to rhetorical confidence in a short space of time. It is designed to be easy to use and intensely practical in order to provide the necessary rhetorical know-how as quickly as possible. The catalogue-style of the fourth book and the brief, clear tone of the work as a whole means that students could have (re)turned to the text as and when they needed to, as it is easy to navigate and makes a useful reference work. Just as, in the short term, Herennius is advised to go back through the books and revise what he has been taught, so again ten years later Herennius could do the same thing.

nevertheless because this part has to be included sometimes and has to be treated frequently in the senate or in the *consilium* in every kind of case, we will give the precepts for it anyway’).

The handbook form of the work meant that it was durable and accessible. It could be used in conversation with a teacher or by students working on their own who read and memorised, did the exercises and studied the *exempla*. By writing a handbook the Auctor gave his words a fixed form that advertised his teaching techniques as well as his awareness of literature, history, politics and law. And yet, having a fixed form did not mean that the way the *Rhetorica ad Herennium* could be used was fixed or restricted. The survival of the text and its use into the Middle Ages shows how the Auctor's careful composition allowed the *Rhetorica ad Herennium* to transcend its context and help those far removed from early first century BCE Rome.

Conclusion

Item vitiosum est in rebus comparandis necesse putare alteram rem vituperare cum alteram laudes.

Again, when making comparisons it is a mistake to think that you must criticise one thing while you praise the other.¹

The *Rhetorica ad Herennium* and the *De Inventione* have long been a pair, but a running theme of this thesis has been to emphasise their differences. By placing the focus on the two texts in this conclusion and the many ways in which they diverge, I show that these differences are as important as their similarities. I take this final opportunity to delineate the texts clearly from one another, demonstrating that the *Rhetorica ad Herennium* can stand alone as an object of enquiry and speak for the variety and vibrancy of Roman rhetorical culture in the early first century BCE.

There are significant differences between the two texts in form and content. Most obviously, the *Rhetorica ad Herennium* provides a complete overview of the rhetorical system as it was formulated in the early first century BCE, in comparison to the incomplete *De Inventione*. This in itself makes the *Rhetorica ad Herennium* a significant milestone in the understanding of the development of rhetorical theory between the Hellenistic and Roman periods, as it is the first time that the full adoption of many aspects can be seen in practice.

Indeed, the Auctor's dedication to including *stasis* theory and the five functions of an orator in his text demonstrates the extent to which Hellenistic additions were incorporated into Roman rhetorical theories.² Although this is also visible in Cicero's *De Inventione* too, the way in which the Auctor continues to challenge and develop the theory further must also be recognised, and shows at the same time that the Hellenistic theories were not simply accepted wholesale or without question. In fact, in the two texts the theories are questioned and rejected in different ways.

¹ *Rhet. Her.* 2.28.45.

² See Chapter 2.

The Auctor's adaptation of different aspects of rhetorical theory is driven by his desire to give his students a clear and practical foundation in public speaking, particularly in court. He is very aware of the aspects of theory that will be useful for someone speaking in Rome, unlike Cicero, whose theory retains aspects that will not be relevant or useful. Acknowledging the Auctor's conscious and purposeful approach to rhetorical theory cannot be done piecemeal; although not every aspect of his rhetorical handbook may seem interesting to the modern reader, the whole work must be analysed with this aim in mind. In thinking about where the Auctor has placed emphasis, and where he has taken particular trouble, the *Rhetorica ad Herennium* can be read as a guide to the rhetorical theory a Roman student really needed to know.³

It is also a good guide of what the Auctor thinks a student really needed to do: practise. The theme of practising dominates the *Rhetorica ad Herennium*,⁴ while Cicero in *De Inventione* does not give his reader instructions beyond the text. Although reading is clearly essential in both cases, the Auctor gives an added element of practical learning that will embed theoretical knowledge for the student and make it all the more valuable. In this way, the *Rhetorica ad Herennium* embodies a particular didactic approach to rhetorical theory, which is inextricably linked with the practical outcome. The *Rhetorica ad Herennium* is something of a missing link in this sense, as it makes explicit the connection between Cicero's theoretical expression of his rhetorical education in *De Inventione* and the more practical description he gives in the *Brutus*.⁵

The Auctor's *exempla* are perhaps the most important and most memorable aspect of his rhetorical work.⁶ Too often, in the past, the *exempla* have been caught up in arguments about whether they were written by the Auctor or not, whether they were consciously chosen or not, whether they were *popularis* or not.⁷ But these debates, whilst useful, have distracted scholars from the simple fact of what they say, and what the Auctor presents as being possible to say in the early first century BCE.

³ See Chapter 2, Invention.

⁴ See Chapter 7.

⁵ Cic. *Brut.* 303-12.

⁶ See Chapter 3.

⁷ See Chapter 4.

In the *De Inventione*, Cicero's *exempla* are functional in the extreme. They are often broken down, sentence by sentence, so the purpose of each statement is clear. They are presented in an almost juristic fashion, impersonal and often unrelated to the Roman context. Cicero was not concerned with adapting his material to make it more relevant to a Roman audience; he did not mind if the scenarios were unfamiliar or the place names unknown, and he admits to using a wholly imaginary *exemplum* because (the implication is) it did not matter anyway.⁸

This presents an extraordinary contrast with the Auctor's *exempla*, which can tell the reader so much more than the right way to structure an argument. Much of this thesis has been dedicated to demonstrating the powerful, vivid nature of the *exempla* and the way that the Auctor's relationship with his audience is mediated and expressed through his use of *exempla*. In addition to telling his audience how to speak, as Cicero does, the Auctor's *exempla* allow him to go further. He presents an inspiring vision of oratory as something that can and does persuade juries, move people, pass laws, start wars and commemorate fallen heroes.

The Auctor's *exempla* are snapshots of contemporary Roman oratory at its finest from figures such as Lucius Licinius Crassus. But as suggested, the *exempla* also stand for the subjects of Roman oratory – both real and potential. From the gruesome death of Tiberius Gracchus to the Social War, the Auctor does not seem to place any controversial recent events off limits. In fact, the murders of the five tribunes, for example, seem to have been so commonly discussed that they were quickly embedded into a standard rhetorical exercise.⁹

But these *exempla* can do more than surprise. By including these narratives of recent events the *Rhetorica ad Herennium* provides a crucially important alternative version of history.¹⁰ Tiberius Gracchus is by no means always a troublemaker who deserved to die;

⁸ Cic. *Inv. rhet.* 2.40.116.

⁹ See Chapter 3. *Rhet. Her.* 4.22.31.

¹⁰ See Chapters 2 and 3.

here he is presented as being violently assassinated in cold blood.¹¹ Marius too is treated in sympathetic terms, the vacillation of public opinion a sideshow to his once-in-a-generation career.¹² Again, the only actors of the Social War mentioned are the Italian ones who will receive citizenship and praise as their reward.¹³ It would be easy to suppose from Cicero's *De Oratore* that the trial of Norbanus was the most important of the 90s BCE, yet the *Rhetorica ad Herennium* gives another perspective from which the trial of Caepio the Younger and its dramatic re-telling of his clash with Saturninus become the more significant.¹⁴

On the surface, it seems easy to associate these *exempla* and the Auctor with a *popularis* cause, but I urge caution here, as the debate around what it meant to be a *popularis* and how it relates to the *optimates* remains unresolved.¹⁵ That is not to say that these *exempla* are not powerful political statements of a kind that is absent from *De Inventione*; in fact, in the Auctor's own terms I suggest that they come close to being examples of *licentia*, Frankness of Speech. With this rhetorical technique, the Auctor explicitly encourages his readers to go beyond the norm, to challenge what their audiences think is acceptable, to overstate their case, and to be daring.¹⁶ The type of oratory promoted by the Auctor in this technique speaks, in this way, for the whole handbook, which is full of abusive speech and invective. This combative side of oratory is not something that appears in the *De Inventione*, but the *Rhetorica ad Herennium* shows that it is hardwired into Roman rhetoric and rhetorical education, as is clear from Cicero's later speeches too.

Still, when the rules are not clear, as with *maiestas*, the Auctor uses his *exempla* instructively.¹⁷ In relation to the law in general, there is a great deal of information contained within the *Rhetorica ad Herennium*, but in a very different way to the *De Inventione*. Both works focus primarily on forensic speech, implying that speaking in court would be the biggest concern for their readers. Cicero goes into great detail about the practicalities of speaking in court as well as dwelling on key arguments such as the Letter

¹¹ *Rhet. Her.* 4.55.68.

¹² *Rhet. Her.* 4.54.68.

¹³ *Rhet. Her.* 2.28.45, 3.2.2.

¹⁴ See Chapter 5, Describing Offences. *Rhet. Her.* 1.12.21.

¹⁵ See Chapter 4.

¹⁶ *Rhet. Her.* 4.36.48-37.50.

¹⁷ See Chapter 5.

vs Spirit of the law.¹⁸ Cicero discusses each eventuality at length, simultaneously demonstrating his own ability to construct complex arguments on the basis of such subjects. On the other hand, while still prioritising advocacy, the Auctor teaches his reader how to argue in court without an in-depth knowledge of the law.¹⁹ This is a very different outlook, and a very useful outlook for people who did not have the money or time to invest in a legal apprenticeship.

Although it is commonly assumed that Roman equestrians and senators had some legal knowledge, or at least enough to make them relatively well-informed judges and jury members, the Auctor's approach is a reminder that not everyone in court could be expected to know about the law. The ancient legal system needed to be accessible to those who were not legal experts, and the Auctor strongly suggests that it was indeed possible to win cases on the basis of persuasive emotional appeals and a clever use of language.²⁰ On this subject, the *Rhetorica ad Herennium* sits side by side with Cicero's later *De Oratore*, where the same attitudes to legal argument are expressed in Antonius' description of his defence of Norbanus.²¹ But where *De Oratore* professes to reject the rules and regulations of rhetorical teaching, the *Rhetorica ad Herennium* demonstrates neatly that the two are compatible, by providing the framework necessary for such an approach.

Following this, the legal *exempla* that the Auctor uses also give an idea of what a basic level of legal knowledge might have been among the Auctor's audience (and, perhaps, more widely) in the early first century BCE.²² The Auctor refers to laws from the Twelve Tables,²³ which were learned by rote according to Cicero,²⁴ presumably at a young age, and some more sensational court cases such as the conviction of Malleolus for matricide.²⁵ It is a measure of the wider public awareness of court cases that the *exempla* mention predominantly criminal cases, which would have been relatively rare but much more elaborate. Alongside this, at the other end of the scale perhaps, the prevalence of inheritance cases suggests that this topic was much more familiar and relatable for the

¹⁸ Cic. *Inv. rhet.* 2.42.121-48.143.

¹⁹ See Chapters 5, 6 and 7.

²⁰ See Chapter 5, Talking to the *iudices*.

²¹ Cic. *De or.* 2.47.197-49.200.

²² See Chapters 5 and 6.

²³ *Rhet. Her.* 2.13.19.

²⁴ Cic. *Leg.* 2.23.59.

²⁵ *Rhet. Her.* 1.13.23.

general audience. The parallels between the use of these themes in the *Rhetorica ad Herennium* and *De Inventione* give them a wider relevance and suggest that the Auctor is being representative in expressing and addressing these concerns. This also shows the importance of recognising the similarities that do exist, which become more significant when the differences are acknowledged.

In general, there is a sense that the picture the Auctor gives here, as throughout the treatise, is one that relates to his audience and the wider context of the early first century BCE.²⁶ The *Rhetorica ad Herennium* is an outward looking text, and it can help to think about Roman Republic in the early first century more generally. It has been particularly beneficial to locate it in post-Social War context of the 80s BCE. The text can clearly be viewed as a reflection of the changing social and legal situations after the Social War. It implies on-going interactions between Romans and Italians in this period and confirms that relationships between individual members of these groups were not always antagonistic, even in this politically difficult period. In fact, the Auctor of the *Rhetorica ad Herennium* may have done well to profit from the changing situation and gained advantage from a new audience with specific requirements.

As I have shown, this text can contribute to discussions about Roman Republican history, law, rhetorical teaching and politics. It is also an example of the cultural productions and discussions in the first century BCE, and the people who had access to them. By studying the *Rhetorica ad Herennium* on its own merits and as an independent text, I have argued in this thesis for the much broader value of the work. Aspects of the *Rhetorica ad Herennium* have long been used by scholars to make specific arguments about particular aspects of rhetorical theory, or as a source of clear and quotable definition, in a way that Cicero's formulations in the *De Inventione* have not been. But the text is much more than a foil for Cicero's own incomplete handbook. The *Rhetorica ad Herennium* is a testament to the dedication and knowledge of one rhetorical teacher who saw a growing demand for a different kind of handbook, and responded to that demand with care and consideration.

²⁶ See Chapter 7.

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